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Jas. B. Hasbrouck P. Bruyn Hasbrouck's.

Devises.

by S. Gould Esq.

By a purchaser on the Books is meant he who is entitled to real property in any other way than by descent.

The principal methods of acquiring an estate by purchase are by devise, by deed, and by levy of Execution.

A devise is a disposition of Real property made by a man to take effect after his death.

The right of devising existed among the Anglo Saxons. but was abolished at the introduction of the Feudal system. It was however preserved in some parts of England by local customs, or by privileges granted by the Conqueror. Terms for years and Chattel interest were not affected by the feudal system in this particular, being new personalties.

The suspension of this right continued for many centuries between the reigns of Hen 2nd and Hen. 8th. But the disinheritance was evaded by the doctrine of Uses.

By the Stat 27 Hen 8th this practice was checked. this Stat transferring the legal estate to the Cestuy que trust. and thus consolidating them.

By Stat 32 Hen 8th it was enacted that all persons having real estate i.e. in Fee simple. Coparceny &c should have power to dispose of two thirds of those holden in Chivalry and the whole of those holden in Socage by devise.

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This Stat. called the Stat. of Wills. was affirmed by the 34th of Hen: 8th -

Now all English Tenures except Copyholds are devisable - Further regulations as to the making of devises were made by the Stat of frauds and perjuries 29th Car 2nd except that it extends that provisions further -

Pow: 1. 2
2 B. C: 376 - The power then of devising in Engd depends upon the Stat 32 Hen: 8: explained by 34th Hen: 8th -

The mode of devising is prescribed by Stat 29th Car: 2nd -

Of devises under Stat: Henry 8th -

No particular form is necessary for devises under these Stats - it is an irregular testament in writing with out any prescribed form of words - Any instrument manifesting an intention to make a testamentary disposition of Lands and having the formalities required by Com. Law will amount to a devise
Doug: 377 under them. provided that such Testament or
Pow: 123 - intention is not contrary to the rules of Com Law. as where the Testament is in the form of a deed and actually delivered as deeds -

So a devise may be written at different
1 Mod: 1st 7 times and on different pieces of paper which
Pow: 15. 105. need not be joined together, and they all constitute but one devise if so intended: Thus A by
62 26 -
Comb: 175 one instrument conveys black Acre to one
1 Bac: 558 person and at a subsequent period he devi-
1 Show: 96 -
155. or 145 - des to another here the devise makes several
Pow: 18 -
Cro Car: 256
1 Chy Ca: 248

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particular distributions of several parts of his estate as he may do -

In this case however the Instrument is not to be declared as his first Will generally but particularly as the Testator made his Will of such a part of his property.

So also he may make several devises of different interests in the same estate. as a devise of Lands to the Testator & one of his heirs. afterwards the same land is devised to the Testator Wife for life, paying such a rent to the son - Both shall be as if made in one instrument for there is a revocation pro tanto

Pow: 18 - Cro Car: 721 1 Ves: 187

So also on the same principle a later instrument may modify a devise made in a former one. as it may diminish or enlarge a condition to it -

Pow: 14. 20 - 2 Mod: 268

A. Reference in a devise to another instrument as a deed, for the purpose of explaining the intention of a part of the devise. thus, A devise to A. all the rents reserved in a certain deed.

Pow: 298 (3) Atk: 273 - 1 P. Wms: 430 1 Ves: 228 Ambl 117 - Cro Eliz 144

So after a Will or devise is made and published the Testator may make a Codicil explaining altering or enlarging the disposition before made. the Com: law annexes the Codicil to the devise and considers both as one instrument -

Pow: 26 - 1 Ves: 187 - 2 Ves: 268 -

By a Codicil is meant an addendage to a Will or devise explaining ascertaining or enlarging the former devise. But a mere recital of some

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1 Vent: 366 Being contained in another instrument is not a devise.

Rayd 345 In the Construction of the Stat. Wen: 8 it was
Sow: 28 holden that every devise of lands must be in
Dyer: 72 writing: but the Judges took the words writing
Moore 177 in the most extensive sense to intending any loose extr
Cro E: 100 Memorandum and letter expressing the devisor
2 B. C: 376 intention.

Sow: 26 Indeed it was holden that the writing need not be
Dyer: 72 made or authorised by the devisor. Thus a devise
written by an Atty in pursuance of instruc-
tions of the devisor, yet written in his absence
and never read to him, was good

So it was holden if one en ventre sa mere had declared
his intention to devise by parol to a particular
person - and another without any direction or
Dyer: 72 authority had reduced it to writing in the lifetime
of the devisor. It would be a good devise -

2 Keb: 345 But these two last decisions were soon over-
Sow: 26 ruled and it was holden that the devise must
1 Lev: 79, 113 be completely reduced to writing during the
3 Lev: 113 Cro E: 100 life of the devisor and by his direction or
it was void.

Where the devisor directed several distinct
Sow: 29 devises and after one was completed but before
2 Co: 61 the others were so done - the first was adjudged good.

It was holden that a devise might be good in
part and void in part; as where a devisee
Sow: 29 answered a condition to the devise without
Dyer 72 authority. the condition was void but the
devise good.

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But it is otherwise where there is a direction to devise on a condition, and the devise was written without the condition. here the devise is not written the Testators life time. 1 Keeb: 880 Moore 330

Assigning by the Testator is considered unnecessary under these Statutes and his name need not be on the face of the Instrument. Pow: 30 1 Bulst: 362 2 Lev: 35 3 Do: 79

Indeed it was holden that any writing tho' not signed sealed or written by the Devisor was sufficient and that the evidence of one witness was enough to establish it. A devise to this effect probably occasioned the clause in the Statute of Frauds and Perjury

It was formerly holden that a contingent interest resting merely on possibility could not be devised under the Statute of Wills. Pow: 94 3 Lev: 427 1 Vearn: 291

It is now clearly settled that they may; i.e. possibilities coupled with an interest before the interest vests are devisable. but a mere naked possibility cannot. Pow: 234. 34 1 Ble: R: 222 3 J. R. 288 1 H. Ble: 30

But an estate that is turned to a mere right is not within the purview of the Statute then & the a Reversion discontinued; E.g. Tenants in Tail and a Reversioner in a lease for life. the Reversioner cannot devise the Reversion for it is discontinued. Pow: 34 6 Co Cas 98. 281

An estate pur autre vie is not devisable under that Name, for they are confined to persons having Estates in fee simple. So of an estate for several lives. Pow: 218. 367 1 Rolle 334 6 Co 5. 86 6 Co Litt: 51 2 Rolle: 150 1 Keeb: 480 1 Ves: 268

So of a Base fee. a Freehold descendable pur autre vie, as if a Tenant in tail grants to A and his heirs. A cannot devise this interest. Pow: 36 Carth 208. 311 Copl: 91 2 Byer 358

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Powr: 67- 2 Bla: 259- But now by Stat Car 2nd estates pur autre vie are devisable unless there is a special occupant.

Powr: 40: 1 3 Co: 32. 10 Co: 81- Bodily Incorporeal Franchises and Offices tho they may be descendible in Engd are not devisable.

Powr: 10. 4 & Wood Instit 135 Copyhold Estates in Engd are not devisable by Stat Wm: 4th.

Powr: 46- Do: 183- 1 Ves: 223- 422- The right of re. entry on lands depending on the non performance of Condition, is not devisable for he has not the lands till the breach of the Condition and this strictly speaking is no estate in lands.

Of the Devise or Instrument itself

The clause relating to this subject in the Stat frauds and Per. Car II enacts that all Devises of Lands shall be 1st. in writing. 2nd signed by the devisor by his consent or express direction in his presence. 3rd Attested by Witnesses in his presence. 4 by credible Witnesses.

Powr: 47- The object of this provision is to guard men in extremis agt fraud.

In devises no form being prescribed by the Stat: Henry 8th any writing which would have been good as a devise under that Stat will now be good if the solemnities prescribed by the Stat of 29 and 8- are observed.

Powr: 19. 48 2 Atk: 308 2 Salk: 278 1 P. W: 433- 3 Burr 1775- Hence under the Stat Wm: 4th a devise executed according to that Stat may by reference to an other instrument make that other instrument part of the devise but the instrument referred to is not thus executed. A Testator by a devise properly executed under that Stat charges his lands with legacies and then by an other instrument not thus exe-

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A devise gives legacies. These legacies must be out of the lands.

The words of the Statute are "lands or other estates". These words do not extend to a bequest of a chattel interest. Gow 63 Gilb. Eq. R. 169

A trust of an Inheritance made under a power, if made by Will must be executed according to the Statute as if an estate is conveyed to A. a trustee to such uses as B. shall appoint by Will - Pow: 480 - 1 P.W. 760 - 2 P.W. 258 - 2 Ves: 175 -

A trust of an Inheritance is within the Statute and cannot be devised but by an instrument made according to it - 2 or 3 Atk 152 - 2 P.W. 258 -

By Will is meant such a Will as is proper for the disposing of Lands -

It is a general rule that a writing purporting to be a Will if averred as such cannot operate an appointment for otherwise the Mischief intended to be remedied by Statute would ensue Pow: 588 - 3 Ves: 597 -

And if a legacy is given generally out of Lands the Will creating the charge must be executed according to the Statute - Such a Charge is in effect a disposition of a part of the Land by devise and so different from the Instrument referred to in the devise - Pow: 69 - 2 Atk 285 Do: 268 -

Rents ensuing out of Lands are within the provisions of the Statute - Pow: 59 -

So a Will giving an Executor power to sell Lands must be executed according to the Statute: for this is in direct disposing of Lands or what is the same thing enabling others to do it - 2 Ves: 179 -

Real property devise.

In Engd the Stat of 4 & 5 P. extends to all lands and tenements devisable either by the Stat of Wills. by devise or by the Stat of Frauds or any other custom -

Of the Solemnities required in a devise by the Engl. and Connt Statutes -

Bow: 60. 1st. A devise must be in writing. Thus regulate indeed, obtains under the Stat of Wills It is also necessary under our Stat. that the word writing is not used. But the words Witnesses seems to imply that it must be in writing -

Bow: 2. 61, 2 St. a 76, Bow: 62. b 3 Mod 219. contra 29 Geo: 2d Bow: 67. 74 1 Wils: 313. Sealing tho usual is not necessary - It has been holden that sealing an assent to a legacy is not within the Stat. The same point is laid down in Lord Raymond - Mr. G. says the contrary seems to be the better opinion as the former facilitates the forging of Wills -

Bow: 61 3 Levi 1 3 Mod 213 affg 1 Eq. Ca. Ab. 403 But the name of the testator written by himself in any part of the instrument is construed as a signing unless it appears that it was not so intended -

But if it appears that the name written in the body of the instrument was not intended as a signing it will not operate as such - Thus if there were an express intention to sign formally and that intention was defeated as Bow: 75- where the devisor the will being in Sheets 2 Eq. 24 9- signed the two first but failed in his attempt to sign the third two died before the ones proceedings lies on the person who opposes the devise in the case -

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The presumption of law (the extent of the devisor being certain) is that the name written in the body of the instrument is a signing. Dow 55-

A devise subscribed by the witnesses and declared by the Testator in their presence to be his Will, tho, not signed by him was holden well executed - Dec Pr 65-

Judge Reeve thinks the Legislature intended that the devisor should write his name at the bottom of the Will. tho. not so construed by the bds. In case of witnesses the construction can do no harm. But it is in some cases dangerous -

2nd A devise must be attested and subscribed by three or more witnesses.

The general object of this clause is to prevent the frauds consequent on the secret execution of devises - Dow: 113. 5th.

The witnesses are to attest three things viz: 1st the sanity of the Testator. 2nd the fact of signing. 3rd the publication. (Judge Reeve says they do not attest the Testators sanity)

1st They are to attest the Testators sanity: for the signing which they attest includes not only the physical act of signing or writing the Testators name but also the requisite powers or capacity of making a legal and effectual signature - 3 J R: 93. 96 Do: 169 -

Judge Reeve says the onus probandi will lie on him who attacks the Will -

And when the devise offered for probate the Testators sanity must be proved. the onus probandi rests on

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2 Atk. 5. 6 Buller 264 Br Chy 308. the devisees, proving the execution to have been formal is not sufficient.

Hence a Court of Chancery will not establish a devise unless the attesting Witnesses have been 2 P.W. 93 examined for the heir has a right to require proof of the knowledge of them.

Bull: 264 Tha: 1996 But their testimony is subsequent being Witnesses is not conclusive as to the sanity of the Testator.

Sully Reeve says the Witnesses do not attest the Testators sanity, tho the Books say they do for they may be called upon in Court to attest insanity -

2 Atk 182 3 Lev: 1 2 P.W: 506- 2 Ves: 455 & 185 3 P.W: 283- 6 Bro: 202. 4 Bro 71- Pre Ch: 286 - 2nd They attest the devisors signature It is not necessary that the Witnesses should actually see the Testator sign. if the devisor acknowledges his signature in their presence it is sufficient - It seems however that a written declaration in the hands of the devisor that his name was written by himself is sufficient evidence to a jury of the facts of signing, it is an implied acknowledgment -

Bro: 76 3 P.W: 286 - Quere Is not an actual acknowledgment necessary? -

3rd They are to attest the publication -

Bro: 260 3 Atk 156 - A publication was necessary before the Stat: of frauds and is not taken away by it -

By a publication of a Will is meant some act of the Testator amounting a declaration that the Will is his; no particular form is prescribed -

Bro: 81 Any act or declaration importing a solemn intent of the Testator to dispose of his property by the instrument is sufficient. - Hence declaring an instrument as a deed is holden to be a publication and this was so done in a case where the Witnesses were deceived and supposed it to be a deed -

1 Vern: 125 Bro 81

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So declaring to the Witnesses that this is my last Will and Testament, is sufficient.

But it seems the publication must be in the presence of three Witnesses at least, their number is necessary in a Republication.

Of the Witnesses' Subscription.

It is holden that if the Will is written on three sheets of paper and one Witness subscribes each, it is sufficient. Com. Dig. Devise (B 7); 3 Mod. 270; Pow. Dev. 89, 90; 3 Burr. 1776; 1 Bac. 548.

So if the sheets are successively up in blank paper their subscription on it is held to be sufficient. Freeman 484; Roe Obj. 185; Pow. 689.

In the presence of the Testator, these words are held by necessary implication to mean within the view. 2 Bl. C. 379

If the Witnesses subscribe within the view of the Testator it is enough. By the word view, is meant possible view; for if the Testator might have view of the Witnesses when subscribing, the subscription is in his presence. So tho. the Curtain of his Bed be closed if the subscription be in the same room. It is sufficient that the Testator could if he wished it see them subscribe. 1 Salk. 295; 3 Atk. 398, 688; Barth. 182; Ca. Ab. 79; 1 Show. 89; Doe 288.

But the subscription tho in a contiguous apartment is not good unless the Testator might have seen it. Pow. 92; Barth. 79; Cambi. 156; 1 P. W. 239; Shore. 89.

And tho the Witness retire to subscribe at the Testators request, the same rules as fully for the cause it seems was introduced to prevent all mistakes as to the identity of the instrument. Pow. 96 & Show 288; 2 Ble. 239; Doug. 282.

If the Testator is insensible at the time of the subscription, tho corporally present, the attestation is not good. This presence implies mental presence. Doug 299.

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1 P.W: 740
Pow: 95- If the Testator is where he might see the Witnesses but they manage clandestinely to sign it while he doubts whether to finish the execution or not. it is void -

Tho the Witnesses must subscribe in the Testators presence. yet the fact that the subscription was in his presence need not appear on the face of the instrument: it is a fact for the consideration of the Jury. and indeed if it is stated in the instrument it must nevertheless be proved. If the Witnesses are dead the Jury must presume the fact -

1 Vern: 128
Pow: 98
Comp: 831
Bulst: 265
2 Ves: 110 -

By three or more Witnesses

Pow: 680
Garth: 35-
Bott or Bolt 702
Com: 174
3 Mod 262
1 Show: 68
2 Ves: 597 -

Under these words it has been determined that if a devise is signed by A and B. and afterwards a Codicil by B and C. the devise is not signed by three Witnesses within the Stat.

But the devise be not witnessed. the Codicil with three witnesses will not make it good

Pow 114

Pow: 108. 9
1 Burr 565 -

Quere as to the franchise. It does not appear except in one case that the Devisor was not present when the Codicil was made -

The distinction between a devise and a Codicil appears to be the grounds of these decisions -

If a devise be made at several times, as in several distinct parts the attestation of one part is sufficient but it may be asked what is the difference as a Codicil and a devise constitute but one instrument?

A Codicil I suppose is intended to effect an instrument already made and completed not to consummate or give validity. The attestation of the Codicil therefore is not effectual as to the original devise but an attestation of one part of a devise is intended to give authority to the whole.

Pow: 680
2 Vern: 297 -

Pow: Hauf -

But where there is a Will and a Codicil on the same piece of paper, the question whether the subscription belongs to one or both, is determined by the Jury. Pow: 106

And as to the question whether a subsequent writing is a Codicil or distinct part of the Original Devise. It seems that if the subsequent part relates to the personal property only and is executed according to the Statute this circumstance furnishes presumptive evidence that it was not intended as a Codicil. Pow: 109. 1 Burr 554

It is not necessary that the Witnesses should subscribe in each others presence or at the same time - but it is most safe, for the oath of one Witness is sufficient to prove that all signed it, in the presence of the Testator. But unless all are present, proof cannot be then made, and if one only is living, the fact of writing of the other cannot be proved. In such case proof can not be had that the Witnesses signed it in the Testators presence unless all were present together. 2 Atk: 177 3 Burr 1775 2 Vern: 429 Pre Ch: 184 2 Ch: Ca: 109 Pow: C: 100 4 Burr 2224 Butcher: 264 Pow: 708. 9 1 P.W. 704 1 Salk: 184 1 Black 685

Judge Reeve thinks the Will and Codicil one Instrument. He also thinks that if the devise is identified in the Codicil that less Witnesses or is present where the Codicil is executed, it will be good. Pow: 708. 20 1 P.W. 140 1 Ves: 177 Pow: 70 Pre Ch: 270 2 Vern: 287 Com R: 284

The ground of decision on the subject is that the Witnesses of the Codicil must identify the Will. If the Codicil is written on the same piece of paper it is good - 1 Burr 548.

Credible Witnesses. This expression is not in the Connt Statute.

The word credible seems here to want meaning, for the credibility of a Witness is never enquired into - If it means competent it is unnecessary, for competency is implied in the word Witness. Pow: 163 1 Burr 417.

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12 Mod 277
2 Ray 505 - It has been decided that a devisee is not such a Witness as the Statute requires and clearly so as to his own devise One who is no Witness cannot be a credible one -

Freem: 510
Carth: 514
Pow: 114 - This rule extends to interested Witnesses generally the heir is a good Witness as to the other devises in the same instrument -

Stra: 1259
Pow: 116 - So doubtful persons rendered incompetent by crimes cannot be Witnesses or testify that they subscribed as when before attestation the Witness was convicted of larceny. Question. If the Witness be interested at the time of attestation is competent to testify at the time of examination can the devise be established. If it is well executed? - It was holden that it could not by Chief Justice Lee - that the Witness must be competent at the time of attestation -

Pow: 113.
Stra 1252.
Pow: 116.17.20
1 Ves: 503 - The Witness' Wife had an annuity charged on the land not released, an interest was subsisting as in the case above alluded to - This Case was carried to the Exchequer Chamber - there was a difference of opinion and the case was compromised -

1 Burr 414
Pow: 104
1 Ves: 503.
2 Bo: 276
Pow: 120 - This question has been decided directly in favour of a devise under such circumstances - The Witnesses to a devise were all Creditors and the debts charged on the land. but as they were paid before the examination, the devise was holden duly attested. The same opinion was entertained by Ld Hardwicke in the case of Price vs Blagg -

1 Burr: 427.
Pow: 130 - The cases of Lord Aylesbury being a Male. is in point to the same purpose - The Witnesses also had legacies charged upon the land in both Wills. It was indifferent to them at the Testators death and not before which was established from various bases

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It is questioned whether the devisee to the Witness was not void ab initio. so that he might testify as to others without a release. It is however not positively settled

1 Burr 428
1 Bl: 451
Garth 515
Stra 1255

The Stat 25 Geo 2nd - being declaratory is an authority in support of the opinion that a devisee to a Witness is absolutely void. and therefore that he is a competent Witness - that this Stat is declaratory see as in the Margen -

Gow: 129. 33
5 Burr 816
Bo: 566 -

It is a general principle of the Com Law that a release by interested Witnesses restores them to competency. But it is objected in this case that there is a term to attend to frame at the time of the attestation but the same objection may be made in every case at Com Law.

Lo Rey 736
Gow: 121
Bowy 134

A legatee or devisee is a good Witness as to the Will for here his testimony is against his own interest.

Gow: 135
Dalk 691

So a legatee who is a subscribing Witness is competent if he is indifferent with him. whether the will stands or not. as if he has the same legacy by two Wills one of which he witnesses -

Gow: 136
1 Burr 479

It seems that a testamentary disposition of personal and real property may be good as to the former tho void as to the latter - for want of due attestation -

Gow: 118
Stra: 1255
Garth: 814
4 Ves Jr 200
237 - 319 -

By Judge Reeve as to the question whether if the Witnesses are not credible at the time of attestation their own credibility can be brought by any matter ex post facto -

" " "

This is a point much contested - Lords Camden and Mansfield differed in opinion upon it -

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"As to the word credible Camden admits that it
"means competent but he says that the interest of
"the Legatee renders him incompetent. The Judge
"agrees in the meaning of the term credible -
"So Ld Mansfield says three witnesses would be just
"as good as three credible witnesses. But who is com-
"petent? - A Lunatic is neither competent nor credible
"So also of a person who has been convicted of the
"crimen falsi -
"The whole question turns on the single point
"whether there is or is not interest. i.e. was he good at
"the time of attestation? if not, then he was not a
"good witness -
"A question arises whether a Legatee is a good
"Witness? If he could never be admitted as a Witness
"it would be idle for him to sign it - But it is ans-
"wered that he was interested to which S. (PR) that
"he must have known that he was devisee for other-
"wise he could have no bias. There is no danger of his
"seeing with a jaundiced eye. But a Bias is not to
"exclude. It does not in other cases - and there is no
"proof that the Legislature intended to make a
"new rule of evidence - But there is no interest vested
"at the time of making the Will. he had nothing
"but an expectancy - and that does not exclude
"that it causes a Bias -
"So an heir apparent is a good Witness to
"prove the Will of his father - May further a Wit-
"ness not having subscribed may testify that he is a
"devisee of the same land - The reason is that the Will

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is an Executory, or revocable. If the word is to have a new meaning, then indeed the Witness is to have different qualifications from other Witnesses they mean nothing. To be sure after the attestation the interest is vested and the Witness is not credible, but he may release it. Thus in other cases makes a good Witness and so why not in this? I suppose if he was not credible at the time of the attestation he could not be purged afterwards. but here he was competent at the time to attest these facts.

Thus much is certain that in Spiritual Courts a release as respects personal property made the Witness competent. and I pray let me ask what is there in real property to alter the case? -

Cases -. The first case bearing on this principle was this. A Devise was made to B. B was a Witness to the Will. He was not allowed to swear. but here was no release. Now it is said that if he was capable at the time of attestation the other could have sworn to it just as if one should become infamous or a Lunatic at any rate there is but one case, Besides I think it stands on different grounds. for I think this case was not on the ground of necessity. but to allow it in this case would be against the policy of the statute which intended to have the oaths of three Witnesses except in case of necessity.

In this case the Witness is only incapacitated sub modo while his interest lasts and not in toto. The Judges speak. Doe as if they were incapacitated at the time. —

12 D Ray 505
Carth. 514
Do. 314

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"The next case was this. A devised to B. and charged "his real estate with ~~an annuity~~ the payment of an "annuity and two legacies - he gave the annuity to "C the wife of D. to her seperate use and to C and each "of them a legacy. D was a stranger to the title.

"In this case B tendered the legacy to D. who would not "accept it. The annuity to C he could not tender. this was "held to be bad.

"The doctrine of purging his non credibility did not "come up - for the Court held that the annuity would "belong to him - this was incorrect or is now. —

"Abbott Lord C. would go to ease him of the duty "of maintenance. Sanswer it was not the true ground "but it shewed that he was considered as entitled —

"But it is said there was a tender and that is in general "equivalent to a payment. Sanswer there is a difference "between a tender and a payment; besides the tender "here was by the Devisee whereas it should have been "the Ex or unless there was a deficiency of assetts for "in Eng. lands are not to be touched till the personal "fund is exhausted even where debts are charged on "the real estate.

"The tender then was from a wrong quarter & "so not good - Sinow in our Statute where debts are "charged on lands they must pay them —

2 Sha: 1253 "This case was decided in K. B. - and on going to Exche
1 Ves: 503 "quer Chamber was confirmed

"The next case was this, An application came before "L. Hardwicke and the Court ordered an account "to be taken whether he were a Creditor which shewed -

that they thought him not credible at the time of attesting - Then it came before Lord Hardwicke he send he meant to enquire into the fact of his being interested at the time of attestation - 1 Vesey: 50 2 Do. 314

This looks like a strong case but he does not enter into a detail. These decisions were followed by a Statute enacting that legacies to Witnesses are void and that Creditors should be good Witnesses. This was to prevent a Will from being endangered - Now it is said that these Statutes furnish legislative evidence & answer the opinion of the legislature ought to have but little weight - they only meant to quiet the business it grew out of circumstances. But in truth they do not overrule. See Lord Mansfield's opinion 1 Burr: 414 - Wyndham v Chetwynd - 1 Burr 414

Parol Evidence - The case in Burr was within the Statute. It was decided that Atterbury's interest was discharged - he became competent -

They did not go on the ground of an interest at the time of attestation and afterwards purged but on the ground of interest at the Testators death - This is like the other case -

The next case was this. A gave his real estate to have the profits applied for the maintenance of the poor in a certain parish. The three Witnesses belonged to the Parish thus to be relieved from taxes to support the poor - and they sold their interest. The decision was that their non eligibility was purged - Lambden that it was an interest at the time of attestation and that it could not be purged - The Bay R: 46 -

great of the Court differed from him. One argument of Lord Mansfield's is judicious. viz. a lunatic attests the Will and afterwards becomes rational, he is a Bona Vidneff and cannot become a good. But in the present case the Vidneff is good at the time of attestation. Besides they are different on another ground for a man biased is capable of attesting to a corporal signature - but a lunatic cannot -

Another question is whether if he does not release his interest he could not come in and establish the Will except as to his own devise? He knows not the [illegible] of the other devises and why may he not be a Vidneff. But it is said there would be a combination to establish each other - but there is no guard against such combinations. It is said by Lord Kenyon that a man must swear to the whole or none - But I believe the above evil is not guarded against -

1 Dall. Rep. 370

This is a question where opinions are against me but not decisions - In the time of Chief Justice Lee four Judges differed from me and two in the case of Burrows - Lex against Lex, in the Exchequer Chamber the Court was equally divided - So the authorities are equal in point of number - This question has been twice agitated. The last time it was decided with Lord Mansfield. the former was in the Superior Court - three against two the other way - Both these decisions have been reversed in the Court of Errors - Thus far by Judge Reeve -

Mr Gen continuation -

Who may devise

The rule in Eng. is that all who may make con-

Real property. Devise

Wills in such respect to real property are not disqualified at Com: law or by the express words of the Stat of Wills, may devise. Pow: 189-

By the words "all persons" in the Stat 32 Hen: 8th is meant natural persons as distinguished from civil or bodies corporate for under this Stat: Corporations cannot devise -

Between the time of Westminster 2nd & 32 Hen 8th no man could devise. But the Stat says "all persons" may devise. Shes means all who could convey by Deed or devise personal property might devise real. Reeve - Pow: 139 1 Roll 628

As to natural persons there are four positive disqualifications in the Stat of Henry 8th viz. Coverture Infancy Idiocy and Non sane Memory - and there are Com law disabilities. Pow: 142. Bac Abr 354 1 Ves: 300-

According to the construction of this Stat three of those persons who could not convey lands before the Stat during their lives cannot under that Stat devise them. Pow: 141

According to the construction of our Stat (Connt) all persons who before the Stat could devise property which was devisable at Com law can devise lands &c. (all persons not legally capable excepted) -

1st Ch certain Feuds of England & Infants may devise by Custom. Full age is completed at the anniversary preceding the day of one's birth. Pow 140 4 Bac 44. 680 1 Dan: 142 Ray: 84 Kelb 84-

2nd An Idiot is one who has no understanding from the time of his birth - But a person is not an Idiot if he has any glimmering of reason, as if he can tell his age - Pow: 144 Bac 143 1 Ble: 303-

3rd A person deaf dumb & blind cannot devise for he is deemed to be an Idiot - as wanting those senses which Pow: 145 Co Litt: 42- 1 Ble: 304

Real property - Devise

purs'd. the mens rea with those ideas &c

Dow: 145 Cro Jac 497 Dyer: 166 - 3rd - A person of non sane Memory tho. not an Idiot cannot devise. by these words are meant Insanity or derangement generally -

It is not sufficient that the Testator can remember common events he must have a disposing memory i.e. he must have as sufficient understanding to make a reasonable disposition of his personalty -

Dow: 146 6 Co: 23b 4th. A Feme Covert cannot devise in Engd. her acts are supposed to be done under the coercion of her husband she wants free will. & has been holden that a custom for a Woman to devise was not good -

4 Co: 61 Bobl: 255 1 Mod: 112 Dyer: 364 Hut 32 2 Ch 1 Dow: 147 3 Com: Dig: 11

It has been decided in Court that a feme Covert can devise real property even to her husband for she may at Com Law devise whatever is devisable except so far as the husbands rights would be affected by the disposition as property to her sole and seperate use - if not real.

Rivley 195 Co: 4 136 2 East: 55

3 Atk 695-709 Cecil: 302 1 Ves: 303-518 2 Ves: 75 1 Bl: Dig: 10 Ple Dig: 204

She cannot devise personally unless her husband consents - This rule it seems relates to personal property belonging to the husband by marriage or which he has a right to control -

There seems to be nothing then in the Condition of Coverture to prevent a Wife from devising what is devisable. provided the husbands rights are not injured -

19 H: 26. 126 Co: 140 2 Co: 316 Shep: 391 Burr: 73. 111 Co: 115. 116. + Bract: 60

She may in Court devise real property by that But even here she cannot deprive her husband of his Curtesy where he is entitled to it -

1 5 Bac Ab 495

But if the husband is banished for life. the Wife

Dow: 165 1 Vent: 104 2 Bac Ab 49 Bac -

may devise for she is a feme sole and may act as such
But there are many ways in Engd in which a feme
sole may retain or procure a right of devising or
disposing –

This may be done by either of the modes of settle- Pow: 189-
ment. 1st By way of trust 2nd By way of power over 2 P.W. 695
a base use – Such a settlement may be made before
or after marriage. It must be done by way of a fine
or recovery –

It seems however that a bare agreement is sufficient
for these purposes tho the settlement be not actually made 2 P.W. 695-
and the heir will be compelled in equity to make a 2 Bro: Ch: 152
Conveyance in performance of their appointments 2 Ves: 191
for equity considers that as done from the time it Pow: 168 –
is agreed to be done –

1st. By way of Trust. As if a Woman having real
property conveys it before marriage or by fine and
recovery afterwards to Trustees in Trust for herself
for her separate use during coverture and afterwards
in favour of such persons as she shall by any
writing appoint – A devise by her will be a good Pow: 169 –
declaration of the Trust and supported in equity – 1 Ves: 612
This is not called a devise but a writing in the na-
ture of a devise –

2nd. By way of a power over a Use – As if a Woman Pow: 162
can make a devise or convey real property as above Bellth 707
for the use of herself for life, remainder to such person 3 P.W. 695
as she shall by writing appoint. a devise by her will 2 Ves: 612 –
be a good declaration of the Trust and supported in 3 Bro: Ch: 62: 3 vo
Equity. and the devisee making such an appointment 1 Vern: 168
is good in Law –

Real property — Leviens

So now it is supported in Cts of Com law: i.e. devises under the power of uses — not so Mr Gould supposes in the case of Trusts. Uses are now legal estate — Every power that is executed takes effect as if the limitation in the instrument or conveyance or rather appointment had been contained in the original Conveyance or deed creating the power — The disposition is considered as taking place when the power is executed though the execution of the Appointee does not take place till the execution of the power —

The deed of settlement is considered as the deed of foundation. The appointment by Levise must in these cases be executed according to the Stat of Frauds —

Pow: 168 — Co: Litt: 111

But if the feme Covert is an Infant she cannot execute a power over her own estates for discretion is wanting —

Pow: 168 — 3 Atk: 397 — 1 Ves: 298 — 3 Bac: 138 — 2 Salk: 695-710 — 714-715 —

Restraint and duress of Imprisonment are not expressly provided against by the Stat 8 th Hen 6 th but implied from the words, his own free will and pleasure, The same rule doubly obtains here for free will which is essential to the making of any Contract is wanting —

Pow: 170 — Byer: 143 — Ray: 334 — 1 Bla: 136 — 5 Co: 119 — Pow: C: 163 —

So it is holden that if a Lucid man is endued by exceptive importunity to make a Will in order that he may obtain quiet. It is restraint and is void — But there must be proof of undue importunity —

Pow: 170 — Stiles: 527 — 1 Chy R: 66 — Stiles 427 —

If either of these disabilities exist at the completion of the Levise, i.e. at its execution and publication — it will be void — but the disabilities be removed before the consummation by the Testators death for the consummation is founded on the exception which is void.

1 Eq Ca Ab: 357 — Pow: 172 — Byer: 143 — 1 Mod: 157 — Ray: 84 or 82 — Viel: 162 — Comb 84 — Pow: 84 — 3 Salk: 238 —

Real Property — Devise —

Joint tenants cannot devise in Engd. this was the rule as to devises by Custom before the Stat of Wm: & M. for the Survivor claims the whole by the death of his Companion — Pow: or Plow: 176 Litt: 285 Co: Litt: 185 Pe Ld: 500

Joint tenants are totally disqualified by that St Wm: & M. which declares expressly that all persons may devise seised in Severalty Coparceny and Common — Comyn: 269 Pow: 12. 178 Co: 218 Bg Ca: 46. 172

So if a Joint tenant makes a devise of his part and survives his Companion and dies. it is not good it is void ab initio: he had nothing at the time devise — 3 Burr 1485 Forth: 357 3 Co: 31 Pow: 176 Bg Ca: 1172

In Count one Joint Tenant can devise and the words of the Stat are general. there is no survivorship — It is a general rule that a man cannot devise lands that he was not seised of at the inception of the title — This seems indeed to be the Com: Law rule as applicable to devises by custom: —

Thus if the Testator devises all his lands, and afterwards purchases more. the latter does not pass.

A devise of lands is in nature of a conveyance in presenti — to take effect in future The Donor must have a present interest in what he conveys: there are some opinions opposed to this — Pow: 168 198 — 2 Roll: 51. 54 Co Litt: 111 Bro Ch: 104 Salk: 237 Bob: or Holt 246 —

Livery is dispensed with in necessitate rei. As other uses as to an after purchased lease for years there is only a Chattel — So a Gift of personalty is not considered at Com Law as a Gift of a specific thing but as an abandonment of any Interest to the personal estate — Pow: 191. 183 — 189 — 1 Rol: 575 — 3 Do: 169 — Salk 237 — Pow: 187 —

So in a Devise by Custom it is necessary that the Devisor die seised for the conveyance is not con-

1 Mod: 178 — 00: 616 — Dow: 184 — 566-611 — Hobt: 348 — 1 Eq Cas Ab 174

Durmated till the Testators death. Thus if the Owner of land after devising it is dispeised and continues so until his death the devise is void but is otherwise if the dispeision is by force for in such case the devise will be good in Chancery —

2 Burr 64 — 1 Mod: 217 — Hobt: 243 — 00: 251 — Dow: 129 — Rowd: 341 — 2 Bac: 52 — Salk 238 —

The same rule obtains under the Stat. Henry 8 th But if the owner be dispeised at the time of making the devise, and afterwards enters and continues until his death, the devise is good for he is supposed to be seised ab initio. He is seised by relation and an act an lies for the mesne profits —

Dow: 202 — Rowd: 322 — Hobt: 243. 251 — 2 Roll Ab 368 — Salk 237 — 2 Burr: 1088 — 7 T. Rep. 406. 16 —

It has been much doubted whether a devise of lands not owned at the time by the devisor but specifically described and afterwards purchased by the devisor is good but decided not to be good. for contra opinions See as in margen —

Dow: 202 — 3 Chy R: 99 —

Upon the same principle a devise by a Mortgagee of Mortgaged lands with out regard to the Equity of Redemption purchased by him —

In Count devise is not necessary by the devisor. Possession is sufficient. the word seisin not livery is used in the Count Stat.

So in descents right of possession is for most purposes equivalent to actual possession —

Dow: 203. 7 — 2 Ch. Ca: 144 — 6 Mod: 78 — 9 Ves: 79 — 2 P.W: 631 — 1 Ves: 496 —

And in Engd a person having an equitable claim to lands i.e. a claim in a Ct of Chy may in Equity devise them. Thus an Executory Contract of A. to sell lands to B, before the conveyance B devises them and dies. is good in Equity agreable to principle in Chancery —

Dow: 208

The Vendor is a Trustee for the vendee. and on a Bill by the latter the Ct would decree a specific performance

Real property - Devise -

This is not treated as a devise of a future estate, the lands belong to the vendee from the agreement in Equity - Pow: 212 - 2 B.W: 629 -

But the land will not pass by a devise made before the executory agreement is entered into - There is no present interest in Equity - It is otherwise if the devise is made for the payment of debts -

It is seen that a Will cannot be set aside by a Court of Equity on account of fraud - But the Law set them aside, and the reason is, that a Will obtained by fraud is not a Will and is void at law - 1 B.W: 578 - 2 Vern: 183 2 Atk: 224 Bk Do - 484 - 3 Atk: 544 3 B.C.C: 358 Cont a Pre Ch: 123 -

A made a Will by agreement with the heir at law - the heir does not fulfil his agreement they will compel him to do it - tho they will not avoid the Will for the Will was not obtained by fraud - but the fraud consisted in the heirs not fulfilling his agreements - 1 P.W: 488 Pre Ch: 4

Of things devisable -

In England under the Stat Henry 8th no other than a fee simple is devisable. The words estates of Inheritance, being declared by the Stat 32d H 8th to includes estates in fee simple only -

The words of our Stat (Connt) being land and other estates, include all estates pur autre vie - Annuities chattel Interests are devisable at Com: law - Pow: C - 2 B.C: 378 2 Ves Jnst: 7 -

But first as to the subject matter - All lands not devisable by Custom are so under the Statute - All lands, then denote the subject matter and not the Tenants estate -

All estates are not devisable but all Lands are i.e. if the Tenant has a devisable interest in them - Pow: 229 -

Tenements and Hereditaments not valuable are not devisable under these Wds - as personal franchises Keys Com: Dig: 241 - 3 Co: 32 - 10 Co: 84 Bro Ab: 359 - Pow: 220. 27 -

Real property — Devise

The words of the Stat. Eve of an annual value — Hayt
then are not devisable. they are no estates but easements.
Dow: 220 Advowsons are devisable being valuable. But rents
Bro B: 369 — 1 Atk: 619 — are devisable under the Stat Hen 8th provided the
Litt: 581 — Bro B: 805 — 6 Co: 33 — owner has a devisable interest in them —

Dow: 229 — Co Litt: 144 — An annuity in fee is devisable. It is different from a Rent in that it is a yearly sum chargeable on the person of the Grantor.

What estates are devisable under these Statutes? or what interest must the Devisor have in the thing devised —

Plowd: 557 — 2 B. C. 109 — 1 Ves: 180 — There are several estates in law called Estates in fee simple: 1st Absolute — 2nd Determinable — 3rd Base fees — 4th Conditional —

Since the Stat de donis fees Conditional are confined to personal hereditaments as an annuity devisable — All those are devisable by Stat 32, 8th —

Dow: 232 — 2 Bacon: 184 — Fee simple is used in the most general sense and is distinguishable from estates tail and pur auter vie —

Dow: 232 — So estates in fee simple may in possession or not as to the former there has been no controversy in opinion, always holden descendible —

Fees not in possion may be divided into 1st Reversions. 2nd Vested Remainders — 3rd Contingent Remainders 4th Estates subject to Condition of Re entry — These interests are all except the last
3 Bulst: 184 — 2 B. C. 232 — 1 Bla: 33 — Bro C: 281 — descendible and devisable. But it was formerly
293 — 384 — 205 — holden that the third class were not fee estates in possession —

As to devises of a Reversion — See Dow: 234 — 10 Coke 71 — 2 Vern: 221 — 286 —

Real property. Devise.

A Reversion expectant upon an estate tail is devisable by Statute Hen 8 c.

So a Remainder expectant on an estate tail is devisable, indeed there is no vested Remainder.

But cannot there can be neither Reversion nor Remainder expectant on an Estate Tail

Co Litt: 111
Rolle 609.
4 Co: 30.
3 V.N: 488
10 Co: 88

Pow: 235
Hob: 313.
2 Wood: 121-382
Salk 232

Estates in fee simple may either be legal or equitable. Both are devisable under the Stat 32 & 34 and this are Equity of Redemption. So an Estate is granted in Trust to A. for B and his heirs. A may devise it before the Stat of Wills & c.

Pow: Mo: 28
Co 104
2 Bul: 338
1 Lev: 857

What estates may be created by devise.

A Tenant in fee simple may devise an absolute fee simple and of course any other fee simple which can be created in the subject by the act of the parties. So one having an actual absolute fee simple in possession remainder or reversion may by devise create a Fee Tail.

Pow 257
Rolle 609.
Pow: 236
10 Co: 97.
Co Litt: 122

But a devise of a fee simple after or upon a devise is not good. This rule however relates to devises considered as dispositions in presenti, and not to executory devises by which the rule is now evaded. But the case stated by way of example would be void by way of executory devise for the contingency is too remote.

Pow: 239.
10 Co: 97.
Co: Litt: 57
Salk: 231
Pow: 280

So a Tenant in fee may devise to another for life or pur autre vie and in the latter case the devisee may act immediately on the devisors death. The remainder in the case descends to the heir of the devisor.

New 280
Comp 241

Real property - Devise -

Cowp: 294
Plowd 35-
1 Salk: 235
2 Freeb: 29-
2 Lev: 144

So the Tenant in fee after having devised for life or in Tail may devise other estates out of the Estates remaining in himself, i.e. the Reversion, tho the whole fee is exhausted, the latter to take effect on the expiration or determination of the former -

Cowp: 210

So a limitation over of the Absolute estate remaining in the Devisor may be either by way of remainder or by devise of the Reversion -

10 Co: 78
Cowp: 242
2 Bac 373.

So a Term for years of Lands may be created by Devise de novo; Quere Could a Term for years be created out of Lands de novo, at Common Law -

Estates created by Devise may be either absolute or Conditional -

Cowp: 245.
Dyer: 126
Do 348 -

Thus to A for life generally, or to A for life paying a certain rent to the heir are there Conditions may be either precedent or subsequent -

Salk 164
Cowp: 246

There are technical words to distinguish these two species of Conditions - Every Condition is to be construed precedent or subsequent according to the apparent intent of the Devisor -

But a Condition descending the qualifications of the Devisee is in the nature precedent. E. G. to A. if she marries with the consent of the Testators Executor -

Cowp: 267
1 Vern: 363 -

But a Devise to A and his heirs upon Condition that neither three months after the Testators death he executes a Release of all demands to B. is subsequent as a present interest passes -

Cowp: 248
1 Ves: 420
Talbot: 165

Estates created by Devise may be either legal or Equitable -

A Devise of Lands where the Devisor has the

Real property -

Devise -

legal title, or of a Use since the Stat of Uses 27 Hen: 8 is a devise of a legal estate for the Stat transfers the legal estate to the use - Pow: 271 2 B. C: 375 - Pow: 8. 278 -

But a devise of a Use before the Stat of Uses was an equitable estate only - So at this day is a devise of a Trust in Equity - Property is said to be holden in Trust when the legal estate is vested in one in trust for an other - Pow: 271. 83.

Uses were devisable at Com law before the Stat of uses. If land be devised to one no use being limited upon it. it cannot be averred to be for the use of any other than the devisee for then would be contrary to the instrument on the face of it - Pow: 276 6 Co: 40

But if a Use is limited it must accrue to the use of the Cestuy que use. If land is devised to A. and his heirs to the use of A for life only - the use of the fee is in the devisors heir - 1 Pow: 271 Topham 4 - Pow: 27a -

An equitable estate may be devised through the Medium of a Trust - Indeed all such uses as are not executed by the Stat are called Trusts - As to the origin of trusts - See Pow: 283. 8 9 5 Mod: 63 - Pow: 285 2 Eq: Cas A: 385 5 Mod: 63 -

The difference between a use and a Trust is that the former carries the legal estate and the latter does not - For the difference between a Trust executed and executory - See Pow: 286. 7 - 1 Atk: 587 - Pow: 162 -

1st. Where the Trustee are directed in the Instrument creating the Trust to execute a Conveyance - it is executory -

2nd Where no further conveyance is directed. A is executed But the executed trust does not exclude the legal estate for it is also an equitable interest - Pow: 286 1 Atk 587

Real property. Devise —

A devise for the conveyance of the legal estate is as necessary in this case as in the other. Lord Hardwicke says that the trusts are in their nature executory.

Pow: 287- 1 Atk: 581 2 Ves: 323

One may devise not only a devisable interest but an authority over such interest. E.g. A devises that B shall have the ordinary disposing and settling of the Testators lands — such a devise however gives the devisee the power only of naming the estate as he pleases and to have it at will — not to sell or lease for years. for he has no interest —

Yelv: 75- Pow: 289 Dyer 36- Cro E: 678 734. 341

But if one devises that his Executor shall sell lands, & that his lands shall be sold by them, and ans appoints constitutes and empowers them to sell, they have a right to sell — A devises (if his personal property is insufficient) his lands to B. to sell for the payment of his debts and all the residue of his real property to B; in this case if the personal property is sufficient. B takes the real property immediately —

Pow: 129 Moore 776 Co Litt: 113- 1 Roll: 30 Comyns 43- 2 Ray 832.4

Authorities over lands which may be devised are of two kinds. 1st Naked. 2nd Coupled with an Interest —

Pow 292 Comyns: 233-

A naked power is a bare authority to sell and no interest is devised (as above). In these cases the freehold descends to the heir till the sale —

Comyns: 446 Pow: 392 3 East: 553- 1 Mod: 113- Ld: 233-

And a release of the authority by the person employed is void. Thus where the Exor is empowered to sell. and releases to the heir. the release passes no interest for the Exor has none —

Pow: 293- Co Litt: 443-4

Such authorities must be strictly pursued and the execution of the power must therefore be construed with a reference to the power itself —

Pow: 294 2 East 271 1 Burr 120 Comyns: 267 Vide: 976 —

Real property - Devise -

So also the power is strictly personal and not transferable. and if it is delegated to two and one dies. the other cannot execute it - So tho. both are Executors they, Dyer 170. 9- take not as Exors but as Trustees

Of course the power in the last case does not survive to the Exor of the Exor. Bow: 294

So if the devise is that his lands shall be sold by his Exors and the surviving Exor dies having appointed an Exor he cannot sell. Bow: 295- Moore.

But if a sale satisfies the words of a devise. the sale will be good in other respects. Thus if one appointed three Executors and appoints his lands to be sold by his Exors and one dies - a sale by other two is good - Bow: 296. 7 Cro: 3: 25- 2 Roll: 524 Dyer: 174 1 Latch: 13- Moore 348

If a man devises his lands to be sold without nameing a person to do it - the Exors are the proper persons to do it - If they are to distribute or administer the avails as in payment of debts - Bow: 301. 398 2 Lev: 280 1 Atk: 420 1 Bac: 200 1 Lev: 311

But if the Exor has no concerns with the avails. i.e. they are not applicable in his hands - the heir must sell - 1 Atk: 420. 6 The Ch: 297 9. 307 1 Lev: 304 -

In the last case but one the surviving Exor may sell alone. for they take as Exors. Upon the same principle it seems. that the Exor of the Exor may sell. Bow: 298. 309 Dyer: 370 -

If the person then empowered refuses to sell, the person for whose benefit the sale was intended may in Chy compel him. and if the person appointed should die. Chy it seems would appoint a Trustee. Bow: 300: 3 -

A devise of lands to an Exor &c. tho' sole is a devise of an authority coupled with an interest. So if one devises the property of his lands to Ex. to take his sons 21. to educate him the authority is coupled with an interest - Bow: 301. 2 2 Lev: 221 3 Bo: 78 Dyer 210

Real Property — Devise —

In these cases the devisee dies not the Heir shall have the estate until the expiration of the time limited. even if the devisee in such case should die. his Representatives shall have it during the time limited. and the reason is that it is his estate during that time —

Pow: 302 1 Burr 200

So the estate of the devisee will continue until the expiration of the time that the object of the devise should be removed. then if the son should die before 21 —

Pow: 302 Chy Ca 98 Dyer 210

The rule is otherwise as it respects naked authorities —

1 J.R: 432 2 vent: 231 1 B.R. 149 —

Under a limitation to such a Children Children of A as B shall appoint, appointment to one of A's children is good execution of the power

A power to appoint by devise is not executed by a mere residuary devise. Thus A having a legal estate in Trust to devise to either of his Sons. devises all his estate to his Son B after the payment of debts &c. In this case a Trust estate does not pass —

2 J.R: 121 Comp: 540 or 500 —

The appointment by Will is no execution of a power to appoint by deed —

6 J.R: 115 2 Vh. Bla: 136 1 Atk: 358 1 Br: Chy 297

Judge Reeve says a devise from the words I devise my lands to A. to sell, is a devise with an interest but I devise my lands to be sold by A. is a mere authority —

6 Cow Car 382 Cow B: 256 —

The person devised to for the purpose of paying debts is called a Trustee. and if he will not accept they will appoint another person

1 Lev: 304

Who may take by Devise —

In general all persons not incapacitated

Real property — Devise

Devise by law may take by devise under the Stat 32 H 8: & Ch — devises in Mortua manus, are not allowed neither are devises to bodies politic —

The Stat 43 Eliz: authorises devises to Corporations for Charitable uses. but the exception is much narrowed by Stat 9 Geo 2 nd — Gow: 314 1 Bla: 499 Bobt: 136

Devises may therefore be either to natural or civil persons except so far as the latter are incapacitated by the Stat above — Gow: 315

Natural persons who may take may be either in esse or not in esse —

Those in esse may take unless prevented by civil disqualifications — Coverture is no disqualification. The husband may indeed at Com law defeat the devise by dissenting to it. But Ch will interfere to prevent this in favour of the rights of the Wife. —

So the Wife may be the devisee of the husband tho, she can not be his grantee. for the devise does not take effect tho after the death of the husband — Gow: 311 1 Bla: 476 Bobt: 241

An alien may take by devise but he can hold it tho Office found it shall vest in the King — Gow: 318 2 Vez: 360 4 Leo: 84 4 Co: 124 3 B & C: 256

An illegitimate child cannot be a devisee until he has acquired a name by reputation. Thus a devise to the son of A is not good until the devisee has acquired the reputation of being A's son — he being a Bastard — But a devise to B. B — he having acquired that name is good tho. he be a Bastard — Byer 303 Moores 16 6 Co: 65 2 Role 43

Real property. Devise.

Bow: 344, 5 Moore 13 Dyer: 345

If a devise is made to the Children of A the legitimate shall exclude the illegitimate and if such a devise is made by the Mother of the Bastard it seems that the same rule holds.

Bow: 320 Moore 367 Salk: 228

As to collateral persons not in esse as Children in ventre sa mere - at the time of the testators death, some distinctions were formerly taken between a personal devise by way of remainder. the latter was holden good if the Infant was born when the particular estate determined. otherwise not.

2 B. C: 169 3 Bac: 124 4 Bo: 212 - Salk: 226 -

But now by Stat 11 Wm 3rd if an estate is limited to one with remainder to his unborn son a Child born afterwards. if born in his fathers life time shall take. Qu: does this Stat extend to Devises?

Bow: 322 1 Lev: 138 Salk: 229 - Str: 1093 - 3 Bac 124 Pearne 429 - S. T. Rep: 50

So a distinction has been taken between a Devise to a person not in esse per verba de presenti - and per verba de futuro. In the latter case it is well settled that the person may take: thus to an Unborn Son when he shall be born.

1 Roll 607 - 3 Burr: 124 Bow: 362 -

The latter is good by way of executory Devise and the freehold descends to the heir at the same time.

1 B. & B: 243 Bow 10: Y. P: 81 Pre Chy 50 - Cro Car: 50

The last distinction does not contemplate remainders - but executory devises to Infants in ventre sa mere.

1 P. W: 246 - 2 Pearne 223. 2 Th & Bla: 237.

So under a Devise to such Children as shall have living at his death. a posthumous child will take.

1 Mils: 105 - Pearne 425 - Salk 230 Ray 2: 83 - Bow: 322, 32 Com: Dig: 803 1 Moore 437 2 Bulst. 273. 6 -

But whether a Devise to an unborn Child per verba de presenti - he being born at the Devisors at the Devisors death is not settled in Eng'd according to Powel - but the weight of authorities or rather of opinion is in favour of the Devisee.

Real Protected - Devise -

The objection to the Present taking in such case is that he has no capacity to take when the devise takes effect: and the freehold must be in abeyance till he is born, if he takes at all - 17 Ref: 463 3 Keb: 225 Pow: 224 330 - 3 Bac: 124 - 4 Burr: 2137 -

But why does not the objection if it amounts to any thing hold in the case of an executory devise to such an Present which is always good. The freehold descends to the heir in both cases till the Present is born and the heir is not accountable for the intermediate profits -

At any rate if there are express words or facts averred in the devise warranting an inference that the Testator was aware of the Devisees incapacity to take immediately. he shall take as by a future devise. Thus to the Unborn son of A when he shall be born.. Pow: 232. 332 1 Lev: 135 1 Eq: Ca: Ab: 173 Salk 227 -

But according to more modern and better opinions. every devise to such a Child does affect such an inference. because it implies a disposition to take effect at its birth. i.e. an executory or future disposition Pow: 323. 35 4 Burr 2177 Fearne 42 & 1 Keb: 105 1 Salk: 230 2 Mod: 8. 9 1 P.W: 480

As to a devise to an Present in ventre sa mere vide ante. on remainder over - See: Cowp: 40 - Moore 4 Cr. 57. Comb: 437

Civil Persons - may be devisees as Exors and Admors Thus a devise to the Exor of A is good - so also to Civil persons not in esse if the interest is clear. and to the Exor of his Exor - Pow: 333 -

But Punishments are not such civil persons as vide take in that capacity or character - Dy: -

Every devisee must be properly designated or he cannot take. The designation may be either by

6 B.R: 670
Pow: 340
407. 498 -

naming or describing him. And tho his name may be mistaken yet if he is sufficiently described in the designation he may take if the name does not apply to other persons -

Goodt: S
Co: Lett S. Ca

This requires to be taken with some qualifications. Parol evidence may under certain circumstances be introduced to explain the ambiguity.

Pow: 330 -
1 Atk. 410 -

And the restriction that not absolutely applicable may be rendered good by reputation - Thus to A the son of B. A being a Bastard the reputed son of B -

1 P.W: 529 -
Pow: 338
& Co: 509. ex
Cro 8: 509 -
60 [redacted]. 123.
6 Co: 55. 66

But this rule does not hold in the case of a Bastard born after a devise as made for he must be capable of at all of taking, at the time of his birth, but he can not obtain the reputation of being the Child of any one, but by continuance of time, besides the birth of such a Child is potentia remotissima -

Pow: 339 -
Co Lett: 580

Hence also a devise to the natural Child of A. must not be construed to his benefit if en ventre sa mere -

Pow: 221
& Co: 73 -

A woman may take a devise under the description of the wife of A. if she is reputed to be his wife tho she is not legally so -

Pow: 340
Dyer: 334
Moore 104
Bott: 32 -

And a devise may also be constituted by names or descriptions that have an equivocal ambiguity, in themselves for male or female as if a devise be made Seniori fratri of the devisor, a daughter may take -

The word Child or Children is a different description. Thus to A for life and afterwards

Real Property. Devise

to his children. his children take a remainder for life. description persona rum

Fow 344
Moore 220

The word Children is used as descriptio personæ in which case the persons described take as purchasers. so if an estate is devised to A and his children he then having Children. he and they are joint purchasers of a joint estate.

Fow: 344
Moore 220
6 Co 17
Co Ltt 7 b 43

But if A at the time of the devise had no Children. Children is a word of limitation i.e. the Children take as heirs they cannot take in remainder as purchasers. because there are no words of remainder. and they cannot take a present estate as purchasers. because they are not in esse. hence A takes an estate tail.

6 Co: 11.16
Fow: 5. 333
Bouj: 309
1 Mod: 165
1 Bulst: 215.
1 Vent: 227
2 Ch Ref: 294

A daughter may take under the description of persons consanguinitatis et sanguinis of the devisor if there is no son. so in this case an elder daughter excludes a younger.

Fow: 342
Co Ltt: 10
Salk 11. 303
1 Eq Ca Ab: 212

The description of a devisee may be either general or special. The former means the description of any person who may happen to answer the description.

Fow 346

1st General. so if one devises to A in tail. remainder to the next heir male of the devisor. he who happens to be the next heir is construed to be the devisee.

So a devisee may be constituted by a devise to such a stock family or house and a male inure to the heir presumptive of the stock family &c.

Fow: 344
Robt: 33
Dyer: 333

Under a devise to the posterity of A

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Devise

Dow: 347
2 Eq: Ca Ab: 390
392

his lineal heirs if he has any shall take, if not his collateral heirs of the whole blood —

If the devise is made to the next of kin of the Testator, the next relation of that name whether male or female shall take

So a devisee may be described by the words next of kin to the Testator, in which the person answering the description by the rules of computing kindred shall take —

Dow: 347
6 Ves & 576
3 East 276

3 East 278
6 Ves 274

when a particular date is interposed the words next of kin, are construed to mean those and those only who are such at the time of the Testators death —

So the words nearest relations, of any name is a good description but in this case relations is "nomen collectivum," and includes all relations of that degree mentioned by the Testator — If the Testator explained what he meant by nearest relations, persons not falling under that description may take — Thus to my nearest relations S and K here the latter not so near as the former will take —

Dow: 350
6 Ves 405
2 Ves Sen 32

If one devises to his nearest relations by the Statute of distributions, his niece takes no part for tho she would be entitled to a part under the Stat of distributions she is not a relation by consanguinity —

Dow: 350
1 Ves: 84
3 Atk 758. 61

If a man wills personal property thus to my nearest relations all who would take under the Statute are legatees —

Dow: 350. 494
2 Eq: Ca Ab 332
6 Ves: 339-368
Talb: 25
1 Ves: 84

Real property. Devise —

If devises of land were there described &c: would the above rule hold or the devise be void on account of uncertainty — 3 Ves & Bea 279 Pow: 352 —

If one devises land to the nearest of his name. A is a question whether a daughter who by marrying has obtained a different name can take according to the same description — She can take if she is unmarried both at the time of the devise and the time of the Testators death — tho she may be married when the question arises — Pow 352 Cro E: 575-6 Co: 532 —

But it is otherwise if she is married at the time of the devise or at the death of the Testator —

But Lord Hardwicke seems to be of opinion that if the devise is immediate or by way of vested remainder it is subject if she is unmarried at the time of the devise. but if limited on a contingency. her name at the time of the contingency happening decides her right — Pow: 356 1 Ves: 383 —

It is a general rule of construction founded on feudal principles that if an estate of freehold is devised to one with a mediate remainder to his heirs. the heirs of his body. or his issue. he takes an inheritance in the first case a fee simple and in the 2nd & 3rd an estate tail — Dearne: 25 1 Bl Com 2577 Doug: 320 Pow: 355 2 Bla: 242 1 Co: 320 6 Co: 30 7 Co: 503 —

Where the remainder is after an immediate limitation, the devisee takes an estate for life. in the inheritance in remainder — Doug: 323 Co: 230 2 Atk: 236 2 Atk 250 —

The words heirs &c are in such cases construed as words of limitation and not description. i.e. to ascertain the quantity of interest given

to the first devisee and not to descendants who is heir after him.

Where the previous freehold is limited to the ancestor the word heir is as appropriate a description as any and as the reason of the rule has ceased together with the feudal tenures boards endeavour as far as possible to narrow the rule itself. It almost always defeats the intention.

Cow: 357

Salk 224
10 Mod 333
1 Burr 2579
2577. or 99
1 Eq: Ca Ab: 184
Cro E: 40
Moore 572
Cow 338
6 Co: 17
Cow: 389
6 Co: 170
Cro Car.
Cro E: 40

An heir may therefore at this day take a remainder as a purchaser under the description of heir, as in this a previous freehold is limited by the devise to his ancestor. If it appears from the devise that the word heir is mere intended as a description of persons. Thus to A for life with remainder to his heirs for life only. So to A for life and his eldest sone male, A takes for life though otherwise if it had been limited to his eldest heir

Salk 224
Cow: 389
10 Mod 203

So to A for life and to his sone male and to his heirs forever here A takes for life only and his sone male a remainder in fee.

1 J. Rep: 294
Cow: 360
3 Atk 731
1 Co: 103
Cro E: 40

Sone in its most proper sense is a description of person but it has been generally construed a word of limitation except where the intention to use it in its most proper sense is manifest.

Where an estate is devised to A for life and afterwards to the next heir male of his body and to the heirs male of his body. The word heirs is a word of description. A takes for life only and his next heir male a remainder by purchase otherwise the word next and the latter added words are useless and a nugatory.

Cow: 262
1 Co: 66
Jeane 25

2nd Special A description of the devisee may be special. i.e. an actual description of a particular person. not a designation as in the above case of any person who may happen to answer the description -

Thus to A the son of B. where the description not only designates a son of B but a particular son of B - Dyer 367

So to the heir male of the body of A now living i.e. the present heir apparent of A. So to the second son of A. there is a specific description of the second son of A in the order of birth - Pow: 367 3 Keb: 32 Pow: 365 1 Vent: 334 2 Do: 311 2 Bin: 660 7 Mod 360 3 Ba & Ab 344

It is a general rule that the devisee answer in sex respects the description given of him -

Where a devisee is described as heir to such a person. he must shew that he is heir in that sense in which the word is used by the testator - Pow: 369 Dyer: 29 - 1 Co: 66 -

Thus if one devise to the heir of B., generally, & dies living B. B eldest son can not take. - 6 Litt: 28 -

So if the testator describes any particular heir. as the heir female of B., the person to take must answer the description. i.e. she must be heir and heir female - Pow: 370. 385 11 Mod: 34 2 Hale 680 Moore 860

So if the intention is clear one may take under the description of his father or Ancestor as if the Testator take notice that his father is living thus to the heir male of the body of A begotten living a legacy also - Pow: 376 Pow M: 229 2 Burr 1010 -

But if the devise shews by express words or by necessary implications that a person not heir general was intended to take by the description of a particular heir. such person must take. Thus to any 1 Vent: 372 Pow: 373 Mod: 34 2 Ray 785 One by Ld J. Do: 464

Real property. Devise -

heir who is Brother to A. B. Here A. B. would then
not take tho he is not heir general

The word heir is construed heir apparent. Indeed
the general rule of construction upon all questions
arising upon devises is that the intention of the
testator shall govern if not contrary to law -

But there has been much doubt whether if an
estate is given to one remainder to the heirs
male or female of his body (the words heirs words
of description) it would be necessary that the per-
son to take should be heir as male or female - or whether under such a description
a special heir male or female might not take
notwithstanding there was an heir general
in esse of a different description - And the ques-
tion is the same if the estate is limited to the
heirs female of the body of a stranger. Thus to the
heirs female of the body of B. - In this case only
the daughters take he having a son. It seems they
would not -

Co Litt: 10b
Co: 24
Pow: 388
Pre Ch: 442
5 Barr: 2517

A distinction exists between this and the above
case. Thus female without more denotes heir
general. But heir female denotes his female issue
whether heir general or not -

Pow: 388
Co Litt: 19.27.
7 Co: 35 -

A person in no sense answering the description
of an heir may take under words importing to
constitute an heir - Thus I devise that my nephe
shall be sole heir of all my estate - he of a mere
stranger - Here the word heir does not designate
the devisee but the interest she is to take by fee

Moore 864
Pow: 395. 96 -
Bobl: 75
Atles 308 -

But if one by devise makes A. executor of his lands
& takes only his chattels personal

Pow: 378-9 -
3 Keeb: 49
Pre: Ch: 671
Atles 301 & 7.

Real Property

Devise—

The general rule is that if the description is so far certain that the person intended may be known from all other persons, the devise shall not fail for trifling omissions— Thus to Margaret the daughter of P.S. her name being Margery— So if to the wife of P.S. and he dies and she marries T.R— and then the Testator dies still she shall take— Robt: 3:2 Pow: 366-9 Co: 4 22 Ives: 333- 10 Co: 57-5 Plow: 314 Co: 3a 523 Plowd: 405 Seame 293

So where a man devises to his posthumous Child unborn who was born before his death still it may adjudged to take under that description or designation— Pow: 406- Pre Ch 176

But if the description is false and not merely defective, the devise is not good— Thus to the heir of A. A being an alien. Dr as if the person obtaining under the devise is reputed to be the Heir of A— Pow: 401

How a devise may fail of taking effect—

A devise may fail to take effect from some defects apparent on the face of it— or from something dehors the Will— Pow: 409-

Of the first kind is an uncertainty or repugnancy in the words used as to the thing devised, or the the interest in it or as to the general interest of the devisor— Such uncertainty is called patent ambiguity— So limitations contrary to the policy of the Law fall under the head of apparent defects—

Extrinsic objections to the validity of devises are founded on some uncertainty or repugnancy arising out of circumstances not appearing on

devise

the face of the instrument. As where a doubt
Pow: 609. 10 arises as to which of several persons or things the
description and the words are intended to apply
Uncertainty or ambiguity of this kind is called
a latent ambiguity.

Of Patent ambiguities it is an universal
rule of construction that if in a devise there is
any uncertainty which cannot be reconciled
the devise is void so far as the uncertainty
extends, and the heir at law shall be preferred
and no parol evidence shall be permitted.

Such uncertainty on the face of the devise
may be either as to the subject matter or the
thing devised; the quantity of interest meant
to be devised or the person described as devisee

1st As to the subject matter. Thus P devises part
of my lands to P.S.

A devise of a house with the appurtenances
1 Bac. Ab: 52 carries no other land than is necessary for the
2 Co: 32 enjoyment of the house unless it appears that
Cro Car 57 the words were intended to be used in a more
Cro E: 15 extensive sense.
1 P.W: 600

2nd As to the quantity of interest. Thus P devises my
1 Ves: Jun: 612. 17 freehold estate to my wife for seven years and if
1 Leeke 612 any of my five sons die before the expiration of that
Co: 75 b: 5 time the freehold is then to be equally divided between
3 Ch ast: 179 those of his sons that should be then living — What
1 Eq: Ca Ab 297 is to be decided? —

10 Mod: 103 3rd As to the persons described. If the person des
Pow: 220 cribed as devisee is absolutely uncertain, the
Atkins: 240 devise is void. Thus to the best man in the County
2 Burr 624
Rep: 82
1 Hale 609
Cro E: 260

Real property-

Devise

of A. or the Prettiest girl in Miss Reeves School, to my niece for life remainder to the heirs male of any of my sons-

1 Ves: 335
10 Co: 57b
2 Ray 1712
Bobt: 32
Cro 3: 104
Pow 422

No parol evidence is admitted in either case. a devise is never construed to be explained if possible

2nd. Of latent ambiguities- If the person of the devisee is rendered absolutely uncertain from extrinsic causes then the devise is void-

Pow: 224
S Co: 104

So also if from extrinsic facts it is absolutely uncertain what land is meant- as my manor of B. the devisor having two of that name. But if the devise was of any of my manors of B. the devisee might choose-

Pow 425
Co: L 225-

A devise may be void of effect from various other causes, thus because the testators intention is contrary to law as to A in fee and if he dies without heirs to B- So if in the draught of the instrument the intention of the testator is not followed the devise is void in toto- But if the part which is agreeable to the testators intention can be seperated from the part which is contrary to it- the former is good and the latter is void. As if the testator devises an absolute devise and the devisee annexes a condition the condition is void and the devise good

1 Bulst: 63
Pow: 226
Salk 234
Pow 432
Pow: 426
Moore 356

Pow: 427

A devise may be void of en taking effect & would produce no circumstances which would not take place without it- Thus if one devises lands to bee to his next heir or to his eldest son-

Pow: 427. 543
2 Atk 57-
Salk: 241 & 233
5 go - Bobt: 23
Ryen 12. 124
Co 854.
2 Burr 880
1 W. 394.
2 Ba: 138
1 Bla R: 187
2 Ray 567-

As to what acts work breaks the lines of descents vide Co: Litt: 12- 1 Show: 93- Salk 337- Carth: 160 -

Real property

Devise –

Engd is a general rule that if one devises to his heir the same estate in the subject matter which he would have taken by descent the devise is void. he shall take by descent and not by purchase –

Com. L. 27, 2 Roll Rep 428

The reason of this rule is 1st that the Lord may not be deprived of the profits of his Tenure 2nd that the Creditors of the Devisor may not be defrauded of their debts as they would have been before the Statute of fraudulent Devises 29 & 4 W & M Mary. these rules have both ceased but the rule is of consequence in Engd as affecting the course of descents and favours the heir –

Com: 388 Do: 430 Rols: 304 1 Saund 268 2 B. C. 376 Com: 461. B Do: 435 –

If any devise to his heir by way of remainder what would descend to the heir as a reversion Still the case is within the rule for the Statute is not altered. Thus to my wife for life remainder to my Son A. A being the Devisor next heir –

Com: 430 1 Roll 626 Abr: 491 1 Lev: 101 2 Lev: 118 Salk 234 Com: 82 1 Ch. R. 83 – 2 Ch. Rep 307 – 3 Lev: 127 –

So a devise for life only to the Devisor heir of no further description of the subject or alleging mode, is void for he takes all the interest which he would have taken had there been a devise and the presumption which descends merges the estate for life

Com: 431 3 Lev: 26 –

2 Roll Rep 428 Com: 433 Gro Car: 433 Do: 919 – 644 Moore Com: 72 Salk 241 Abr: 1270 –

charging debts or portions on the estate devised to the heir does not enable him to take by purchase the quantity of interest is not altered the estate is only circumscribed

Com: 436 Gro Car: 101 2 Mod 286 1 Vern: 243. 6

But it has been holden that if the charge on the land was by way of condition the heir to whom it descends takes by purchase. The weight of authority however is against this distinction. vide as to merger –

Real Property. Devise.

If then a devise is made which falls within the General rule to the heir who is at the devisors ~~daughter~~ death a daughter the birth of a post humous son will take away the title. Salk 248 Co Bi 839 Co: 819 Fow 433 Cowp: 72 Fow: 437

Tho an alteration by a devise of the term of the time of the heirs receiving the estate does not enable him to take by purchase the quantity of interest being the same yet if the limitation to the heir by devise produces an alteration in the mode of descent he takes by purchase i.e. as devisee. Thus if one leaving two daughters who are his heirs devises to them and their heirs they take by devise as devisees for the devise makes them joint tenants but by descent they are Co-heiresses. Cowp: 72 Fow: 439 Duke 148 Salk ~~234~~ 241 234

So in the last case if the devisee had devised all his estate to one of his daughters she would take the whole by purchase for if she only took half by the devise her sister would be Coparcener with her of the other half and so the devise would be defeated. Fow: 441

And a devise may also on the general principle be good ~~in part~~ and void in part as to one entire thing. Thus a Tenant in fee devises one half of Black Acre to his heir in fee and the other half to the same heir in tail here the former is void and the latter good Fow 442 2 Rayd 2460

A devise may fail of its effect by the death of the devisee living the Testator. Thus to A and his heirs, A dislikeing the Testator the heirs of A cannot take and this is the case even though the devise is republished after A's death — Ray 405 Bro Chy 429 L.T. Rep: 601 Plowd 448 2 Burr 722 Mar 25 Doug 325 1 Mod 267 2 Mod 313 Fow: 672 1 P.W: 87 Co 3: 423

Real property. Devise —

Waiver. A devise may fail of its effect by waiving the benefit of it. and the waiver may be either express or implied. It is express when the devisee actually refuses to accept the devise. An implied waiver arises from some act of the devisee from Powell 443 which it is inferred that he does not intend to accept.

It is a general rule in Engd that a person having a claim upon the thing devised, independently of the devise, and a claim to the other part under the devise accepting the former claim waives the claim Powell 445 to 454 Burr 580 to 2323 Talbot 176 for the waiver is implied. Thus Blackacre is devised to a stranger and Whiteacre to B. if B. elects Blk acre under a former settlement he cannot have Whiteacre under the devise —

Powell 448 to 453 Talbot 176 2 Ves 14-317 This doctrine of implied waiver is founded on the idea of a tacit condition annexed to the devise that the devisee shall not disturb the disposition which the devisor has made —

Powell 450 1 Ves 336 to 426 Powell 304 Talbot 170 But it is not necessary in order to give effect to the devise that the thing devised be of the same nature or of equal value with that to which the devisee has a claim independently of the devise. In such cases they must make the devisee elect —

If the devisee be a creditor and not a volunteer the rule does not apply —

Thus if one devises part of his estate for the payment of debts and to P.S. another part to which a creditor Powell 484 2 P. Wms 412 2 Ves 617 to 637 has a higher title than the devisor the creditor may append his title to the latter and take claim his share of the estate devised to pay debts for the bound devise to P.S. as the creditors —

Real property — Devise —

Lo of land to which A has a higher claim
Vaun the Testator is devised to B by any instrument
not executed in such a manner as to pass lands
and A legacy to A. A may claim both land and
legacy, here the latent condition does not apply
for the Testator has not disposed of the lands there
being no devise as to that — Pow: 458 2 Ves: 298 Bo: 307 —

But still if there is a clause in the Will provi-
ding that if he disputes the Will he shall forfeit
his legacy - his claiming the land will defeat Pow 460 1 Ves: 12
the legacy - for there is an express condition annexed
to it —

If the Testator gives a thing in satisfaction or
instead of a particular thing expressed that shall not
exclude him from another benefit - Thus the Testators
Wife is entitled under the same agreement to a
portion in lands and one in money - and he gives Pow 463 6 Ves: 30
her a legacy instead of the money portion and
devises the lands here she may claim both lands
and legacy —

And in all cases to oblige the devisee to
elect as above, it must be clearly evinced that the
devisees taking both the interests would defeat the Pow or Bow 446 Bellh 430 2 Ble: 365 Lo Ray 438 1 Ves: 230 2 Bg 62 301 —
devisors intention - Thus if the devisor having devised
Black acre to his wife, immediately devises to her
White acre by way of remainder this does not prevent
her from claiming her dower in Black acre - so a
Wife may claim her or marriage settlement tho not
devised to her, and a pecuniary legacy also —

Real Property — Leases —

A Lease may take effect by the Lessors accomplishing in his life time what it was the object of the Lease to do. As where a Lessor leases a house & to build a house and afterwards before his death lays out more than that sum on the same house. It was held that his heir should not have the benefit of the Lease —

Pow: 470
11 Vern: 95

So a Lease may fail of taking effect in consequence of that 3 & 4 Wm & Mary against fraudulent Leases for under that all leases of Lands are void as against the Lessors creditors who are entitled to be paid out of the lands if the assets fail and in this case the heir and a Lessee are equally —

Pow 471
Comyn 676
3 Bac 27
2 B. C.
3 Atk: 134
2 Bo: 128
1 P.W: 1297

Before the stat of Leases selling and alienating before action brought be held to the exclusion of creditors — This Statute is construed liberally —

3 Bac: 27
2 B. C 378
Pow: 473
2 Atk 295.

This stat being made merely for the sake of creditors and not at all in favour of heirs at law it has made no manner of alteration but barely between the Creditor and Lessee and as to the heir and Lessee the law is as before. Therefore if a Lessee Creditor come upon real assets he shall resort to the lands descended in the first place for the heir is only entitled after all gifts are satisfied —

Pow 471. 5
2 Atk 438.
3 Bo: 12 —

How far parol evidence may be admitted to explain or contradict a Lease.

Every instrument instrument in writing consists of two parts viz. matter of fact and matter of conclusion of law —

The former may be averred by the parties entitled in the instrument and is triable by jurors as whether the instrument was executed or whether after execution it was altered. — Gow 477 & Co: 155

But matter of law is not subject of averment it is not triable by a Jury and therefore not proveable as a fact. Thus a devise to A and his heirs what estate A takes is a question of law to be determined by legal construction — An uncertainty of the former is a latent and of the latter a patent ambiguity. Gow 477. 487 & Co: 155

It is a general rule that the testators declarations cannot be given in evidence to controul the explication of words contained in the devise or to give them an importance which upon the face of them they will not bear — This rule has obtained since devises were required to be written and since the Stat of frauds — C 5. 18. 141 3 Mod 615 1 Ves: 632 Abr: 345 Gow. 474 561. 676 Bro P. 745 & Co: 63

The testators declaration may supply to the devise or to the person of the devisee and in both cases they are in and inseparable when they relate to matter of law — Gow 478 6 J. R. 671

1st As to the import of the devise itself —

Thus to A and the heirs of his body begotten on condition that he or they would alien — by a deed evidence is not admitted to show who were meant by he or they, this is a matter of legal construction on the face of the devise — Gow 478 & Co: 63 2 Vern. 98 2 Ves: 216 Gow 608

Real property. Devise.

Gow: 480-608
5 Co: 68-
1 Vern: 98
2 Ves: 216-

So if one devises to his neice generally, parol evidence is not admissable to prove that it was intended instead of Bowen.

Gow: 480
2 T.R: 316
1 Ves: 189-
2 Atk 211
2 Bo: 318

So where a devise was on a condition. Letters which were written by the Testator were not admitted to prove that events which had happened were intended by him to amount to a breach of the condition.

2nd As to the person of the devisee. The Testators declarations are not admitted as to matters of ~~law~~ construction of law: ebs a devise to A who died living the Testator, parol evidence was not admitted to prove the testators declaration that B. who was A's son, should take. A's son would have taken his devise had A lived, then there would have been no ambiguity for he stands in the place of his father.

Gow: 485-
Bow: 334,
Cro E: 429.

So where the Testator mentions two women in the devise and devises to her, parol evidence is not admissable to shew which of the two he meant. The rule is the same as to Com: law conveyances. but it is not admissable to contradict the words.

Gow: 500
4 Bl. 461-512
2 Vern: 216
Salk: 240

Thus if one devises to his son A. he having two sons of that name parol evidence is admissable to shew which of the two he meant. for the evidence stands with the words. The ambiguity is latent when the declaration of the Testator can be proved viz that he thought the eldest son was dead.

Gow: 488-
Bo: 496
5 Co: 68
1 T.R: 676
2 Bo: 137-
8 Co: 155
6 T.R: 637-
671-
2 Ves: 216.
1 Bro C.C: 402

Real Property — Devise —

No parol evidence has been admitted to prove whether an instrument was intended as a deed or as a devise — 3 Keble 310 1 Mod: 177 Pow: 490: n

So if a devise is made to A the then being Father and a Son of that name parol evidence cannot if able to prove that the Testator did not know the Father — Or the devisee is wrongly named still he may be proved by parol to be the person intended — Dell: 7. 6 Mod: 199. 1 Atk: 412 2 P.W: 134 10 Co: 20 (a) 1 Ld Raym 297 6 T.R. 671 Pow: 307. 4 Leo: 111 & n

It is said to be otherwise in the authorities in the margen — Pow 498 10 Co: 27 —

So on a devise to A's own Children the Heir apparent at the time to Lay B. and Z by A. the declarations of the Testator were admitted to prove that the Lay B. were intended — Pow: 494 2 Ves: 216

But a devise to the son of A. he having several sons is void. Parol evidence in this case is inadmissable. The ambiguity is patent and a matter of construction — Pow: 488. 490 — 10 Co: 155 — 3 Bly R: 199 2 Vern 624

If the name applies exclusively to one person and the description to another it may be proved by parol that the name was inserted by mistake — 6 T.R 671 Pow: 498 1 Atk 41. Gwen —

So when the Testator gave the devisee a name which he never had. Parol evidence may be admitted to shew that the Testator knew a person and used to call him by that name tho' his death — Pow 499 2 Atk 240

And where a devise was to the poor of A in the County of B. and it was in the County of C. parol testimony was admitted to ascertain the fact — Pow: 499 — 2 Eq: Ca: 416

But if the person to take be not in some

Real property — Devise

2 Bes: 217
Pow: 500
521. - 3 -

dont described in the devise, no averment will be admitted (if he is wrongfully named) to shew who was intended because in such case the ambiguity appears on the face of the instrument. The evidence Mr G. supposes would not stand in with the words —

If words of equivocal import are used parol testimony is admissable to prove the meaning of them. This is done not so much for the purpose of effecting an explanation or construction of words not understood, as an interpretation of those words or terms —

Pow: 340
Leyer: 337
Pow: 496.
Moore 404
Hobl: 132

For a devise "Senioni puero," parol evidence is admissable to shew that the eldest child was intended so that a daughter can take. So where the devise is to the devisors nearest relations parol testimony may be introduced to shew that he knew certain persons answering the description. but any further declarations are not proveable —

Pow: 497. 8
1 Ves: 231

But in these cases evidence is never admitted to give words a sense which they will not bear on the face of them. Thus the word son is sometimes construed to mean Grandson but not if there is a son living. But if it appears from the devise that the words were intended to mean ex son only no parol evidence is admissable to prove that the word son was meant for Grandson —

1 Bevl. 340
2 Mod 316
Ray: 408
2 Mod: 63.
106. or 9 -
Pow: 678 or
80. 67 or
80: 806 7 -

Parol evidence is never admitted to supply any thing not written —

As a devise of £100 to Mrs — parol evidence is not admitted to shew whose name is intended —

Pow: 502
2 Atk 240
1 Eq Ca: 419

Real property

devise

So when the Testator ordered all his personal property to be given to his Executors and it was by mistake omitted any evidence of the mistake is inadmissable — 4 Ves: 185 Bow: 523 4 Ves: 195 18 Ea: 413 or 418

Courts of Law and equity have admitted proof of extrinsic facts to explain words of equivocal import as to the quantity of interest devised, i.e. where the proof stands with the devise — Bow 502. 20

Proof of the Testatrix has been admitted to ascertain the quantity of interest the words being equivocal. As a devise of the Testators whole estate to P.D. he paying the Testators debts. Evidence may be admitted in this case to prove that the personal property was not intended to pay them and therefore a fee must pass. Bow: 502 1 Keeble: 59.

It is now well settled that the word Estate carries a fee unless limited by other words — 17 Ves: 412 2 Do: 657 6 Do: 348 8 Do: 575: 02 4 Co: 93 —

So when the question arises upon equivocal words, whether a legacy of the Testators estate took it absolutely or for life the heir of the Testator might give evidence was admitted that it was not sufficient to support her, unless she had the principle or stock. Bow: 507 Cre Eliz 510

Proof has been admitted for the same purpose as to the value of the property devised, as a devise to A of all the Testators property he paying to B. 100 per annum, out of the clear proceed proof may be admitted to shew that the sum exceeds the annual profits. to shew that a fee was intended. Bow: 518. 506 — 18 Ream: 479. 2 Eq: Ca: Ab: 298

2 T.R.: 503.
3 T.R.: 350.
5 T.R.: 13.
3 Atk: 341

Now regularly a devise of lands charged with the payment of a gross sum carries a fee of course since such evidence is unnecessary.

3rd. Proof is admissible as to the condition of the Testators family to ascertain the application of terms which may be words of limitation or purchase. As a devise to A and his children or his issue, proof may be admitted as to the condition of his children at the time of the devise if not an estate tail is created.

Dow: 405.
Co: 518.
1 Bulst: 209.
Vent: 227, 334.
1 Vern: 460.
Co: 480.
2 T.R.: 299.
1 Co: 19.
Doug: 309.

4th Evidence is admissable as to the testators property to ascertain the meaning of words not themselves equivocal but which when considered with reference to the estate of his property will bear and require a construction different from that which appears to be the import. Thus A devises to A the house called Bela Vavern. proof is admitted to shew that A was tenant in fee since the devise held only the reversion. in order to shew that an estate in fee was intended.

Dow: 508.
Ray: 834.
Vent: 346.
1 Br. Par. Ca: 135.

So evidence may in one case admitted to create an ambiguity where there was none on the face of the instrument. there the proof stands with the words and not with the meaning. they prima facie convey.

Dow: 513.
Fra. Ch: 72.
Co: 472.

But evidence which does not stand with the words cannot be admitted, as where one devises to the children of A. he having six, evidence can not admitted to shew that four only were intended.

Dow: 524.
Co: 594.
Co: 12. or 512.

So where the Testator devises the residue of his estate to his Executors one of them being indebted

£3000. Evidence was not admitted to shew that he intended to give the debt, or that it was the testators intention that his Exor should have it — for the residuary clause included it. Dow: 524 Talk 240 Stra 1261

So where the residue of the testators property was not disposed of, evidence was not admitted to shew that he intended to give the debt, or that it was the testators intention that the Exor should have it — Dow 524

But parol testimony of the testators intention is admissable to assist an interpretation.

An equity means in general an equitable claim - but the meaning of the rule as extended here to devises is this - that where from the nature of the devise Equity derives an inference which is against the legal construction arising from it, parol evidence is admitted to rebut or controul the former which is in effect to establish the latter - As if land is devised to an Executor but in equity there is a resulting trust as to the surplus to the heir, i.e. the Exor as trustee - In this case parol testimony of the testators intention is admitted to shew that he intended the Exor to have the surplus - Dow: 226 Do: 326 Coby Ca: 144 Ves: 252 Do: 674 Ves: 323 Eq Ca Abr 506

So where the testator made a bequest to A and B of £250 each and afterwards by Codicil directed his Exor to pay them 2 of £250 in specie, parol evidence was admitted to shew that he intended both sums were intended to be given — Dow: 626 per May 1924

So where a Testator gave considerable legacies to his Exor from which the inference in equity was that he should not have the residue evidence was Talk 79 Dow 517 2 Vern 677

admitted of the testators declaration that he should have it — devise

Parol evidence has been admitted to shew that a devise was intended as a performance of a previous agreement; as an agreement by marriage articles that the wife should have one hundred pr annum — evidence is admissable to shew that a devise to that amount was intended as a performance —

Parol evidence is admissable in all cases to counteract fraud; as when one devises his real estate to his Exor and omitted to charge it with an annuity devised to A. because the Exor promised to pay it. parol evidence was admitted —

Pow: 519
2 Vern 506

Pow: 530
2 Vern: 506

A man gave his property by devise to all his children and named them A. B. & C. but omitted the name of one: on the case it may be proved that his name was left out by accident —

16 Ves: 674
2 P Wms: 136

Any estate is given to A and his children, if A has no children at the time. it goes to him as an estate tail. If he has children it goes to him and them together. Here parol evidence may be admitted to explain the ambiguity thus existing

6 Co: 70
3 Keeb: 49
3 Burr 1878

A may be explained by parol. And parol evidence may be sometimes admitted to explain words not equivocal. nor attended with any patent ambiguity. As where the technical use of the words will make the devise void or ridiculous —

1 Salk 284
2 Lutw 1548
2 Bro Ch: 412
Co: Litt 112

If a leases a Mortgage estate. his heirs may use the personal estate to discharge the Mortgage. but parol testimony may be admitted to shew the testators

intention. that they should take A cum onere.

If there are repeated legacies. As said parol evidence may be admitted to shew the Testators meaning. The rule now is. If the legacies are in the same instrument they are not accumulations and only one goes to the legatee. If one is in a Will and the other in a Codicil they are accumulations.

If there is a legacy in a Will of £100 in money and £100 in some thing else. they are accumulations. 2 Rep

Revocations.

Wills and Testaments are not consummated until the testators death and therefore are revocable by them. Gow: 550 2 Bl Com 2512

Revocation may be considered under two heads. 1st As they stood at Common law before the Stat of frauds. 2nd As they now stand under the Statute. Gow 532. 129

1st Revocations at Common law are of two kinds Express and implied. Express Revocations might be written or parol.

1st By writing, as by a subsequent will or Codicil expressly revoking the former or 2nd by parol as if one having made a devise expressly declared or attested or any words of similar import. Gow: 502 Co: 633. 632 Dyer: 310 1 Roll 615

But in this case it must appear that those words were spoken animo revocandi. Wherefore when the devisor died because the devisee did not visit him he should not have the land but making no express reference to the devise it was not considered as Revoked. Gow: 153. Bro Cas: 151

Real property. Devise.

Powr: 553
Cro Eliz 597
Moore 484
Cro Ch: 806

So words in derogation of an intention to revoke at a future time do not amount to a Revocation at Common law. — "As my Will shall not stand, or I make alter it". —

2 Vent: 406
Do: 445 —

The same rule holds where the Testator in case of a similar intent expressed in writing —

2dly Revocation at Common law may be implied. The implied revocation is by some act or declaration
Powr: 523, 35
1 Lev: 68
1 Keble: 253 —
per-mishing ground to presume that the Testators intention to devise is changed. This is a revocation in law as if having devised to a stranger he says "my son shall be my heir". —

Powr: 257 or 37
Do: 554 —

The acts of the Devisor amounting to a Revocation may be in writing or in parol —

1st By writing. as if one having made a Devise makes another inconsistent with the former tho not
Powr: 535
3 Bulst: 311
3 Mod: 206 —
expressly revoking it — this amounts to a revocation in law.

2 Atk 318
Do: 375 —

It is held that if one devises lands to A and on another part of the Will devises them to B. A & B take jointly. But it seems not to be so in a bequest of legacy for there the latter revokes the former —

2 Ble R: 297
Powr: 236 —
Hard: 374
Show: P.C. 146
Mod: 203
Salk 592
3 Bulst: 277
Comp: 87 —

But a subsequent Devise not containing express words of revocation does not revoke a former unless inconsistent with it — therefore the bare fact that a later devise exists. tho found by a Jury will not compel the Court to decide that that former is revoked, for the latter may relate to a different subject matter or it may confirm the former —

Real Property Devise —

And though it is certain that the latter is different from the former, if it is not ascertained in what that difference consists, it is no revocation — Pow: 538 3 Vels: 497 Comp 267 2 East 488 2 Bro P. C. 344

So also a Codicil inconsistent with the preceding will works a revocation —

A distinction as to the effect of revoking by a Codicil one by a subsequent will has been taken viz that the Codicil being part of the Will one not in its nature intended as an instrument of revocation does not revoke, except precisely in the degree & purpose — Pow: 541 3 Ath 552 1 Ves: 33 —

Thus a devise of lands to B. C. and D. trustees for charitable purposes one by a Codicil it is devised in the same trust to 6 persons including the same three, the trust is not revoked. Where as it is clear by Powel that a subsequent will varying the distribution made in a former is a total revocation — Pow: 543 548 1 Ves: 178 Bo: 185. 9 — 3 P. W: 345 Comp: 87 — Cro E: 721

If one makes a second devise inconsistent with the former one under a false impression as to matter of fact which furnishes the matter for making the second and the fact supposed is found after his death not to exist, the first is not revoked. As where one devises lands to A. and afterwards by an instrument executed that A is dead devises the land to B. here if A is alive he will take in preference to B — Pow: 546

But according to Powel a false impression will not avoid the devise unless it is the effect of deceit practised upon the Testator. Quere de hoc for he seems to mean by deceit nothing more than a misrepresentation of fact Pow: 446

Real Property Devise —

If a former devise is revoked by a subsequent one, on the presumable that the former is inconsistent with the latter, the implied revocation lasts only as long as the instrument containing it is in contemplation of the Testators death. Therefore by a Revocation of the latter the former stands —

4 Burr 2512
Bla: R: 479
Pow: 459 —

But it seems that if a second devise expressly revokes the first, the revocation of the latter does not revive the first again, because there is an express independent and substantive act by which the first became immediately void —

Pow: 551
Cow: 552
Doug: 40
Cowp: 92
4 Burr 2512

2nd Acts amounting to an implied revocation may be by matter in fact as 1st by an alteration in the relative circumstances of the parties 2nd by and actual intended alteration in the estate devised —

Pow: 554
Co: 532. 65

1st No alteration in the circumstances of the devisor except marriage and the birth of a child has been held to amount to a revocation of a devise previously made — (the devisor being a man)

Pow: 554
4 Burr 2171. 82
1 Hats: 240
1 P. W: 304
4 Doug 95 —

But here an alteration of the circumstances is an alteration of the devise — Thus is true of the child is posthumous —

1 Ves: 195.
3 Selk 292
5 T. R: 49 —

The reason of the rule is that from such a change of circumstances the Testator is presumed to have changed his mind with regard to the disposition of his property —

Pow 556
2 Plow: 337
Doug: 34
2 Ld Ray 1441

Were any evidence either written or verbal is admissable to prove that his intention was not altered, i.e. to rebut the presumption against him as his declaration &c —

Pow: 514. 6
Doug 31. 5
2 T. R: 522
2 Best 530. 4 Batt
18 Ves: 6 Mb: 413

Real Property — Devise —

Where a Testator devises his estate to one woman he afterwards marries and gave only a legacy to his brother. Such a change was held not to amount to a revocation

A subsequent marriage only or the subsequent birth of a child only is not sufficient to revoke a devise. But in case of a subsequent marriage and birth of a posthumous child, the devise is revoked. As the conception was unknown to the testator. Else é converso if he knew of the conception at the time of his death and an abortion should take place — this would be no revocation — 58. R: 5 e 6

Yet this intention would not be influenced in the former case, and in the latter it ought. And what effect can a mere intention to revoke have without an actual revocation — 2 Eeat 541

According to Lord Kenyon there is a tacit condition annexed to every devise at the time of making that the testator does not intend it shall take effect if such a total change should happen in his condition. This principle is opposed by Lord Ellenborough — at any rate this idea reconciles the authorities —

But there has been no case decided in which marriage se have been holden to be a revocation except where there is a disposition of the testators whole estate and it seems that if the testators wife and children are duly provided for either by his dying intestate in part or by the devise itself the presumption of the change of intention does not arise from the marriage or the tacit condition is not annexed — Gow: 556 Do: 560 2 Eeat 541 184 Co: 415 Doug. 33 e 6

Real Property — Devise —

2 East 530
Doug: 39 — Marriage or will not revoke a Devise made in contemplation of such an event and providing for the future wife and Children —

But if a Feme sole makes a Devise and marries it is an English principle well settled that it is suspended during coverture so that if she dies before the husband it is revoked for it is the nature of a Devise or Devise that it may be revoked or confirmed at the testators pleasure and a feme covert has no will or pleasure —

1 Ann: 181
~~2 Ves: 560~~
1 Bac: 292
6 Bac Ab: 161
6 Co: 61 — But if the Devise survives her husband and becomes a feme sui juris, according to Powels it survives of course —

Rowe 566
4 Burr: 2511
Pow: 564 — But an alteration in the personal capacity of the Devisor though such as to render him incapable of making or revoking a Devise, does not of itself work a revocation for until his change he has the power of revoking — there there is presumed no change of interest —

Pow: 72. 564
6 Co: 61 —
1 Ann: 181
1 Vern: 105 —
1 Eq Ca Ab: 234 — 2nd An act in fact in contrary to an implied revocation may consist in either an actual or intended alteration in the estate devised —

Of an alteration actually made —

Pow: 565-603
1 Rolle 615 —
1 Bro P: 314
Do: 316 — For these cases the revocation is in consequence of a positive rule of law. The intention of the Testator is not regarded. It is not founded on any presumed intention —

The positive rule or principle observed is this that the Devisor must be seised at the inception of the Devise: so the whole must remain in the same condition till the consummation of it. It must

Real Property

Devise —

in contemplation. Lands have been in his seisin and remain ut supra. Hence any alteration in the estate between the inception and consummation of the devise, which puts it in a different light works an implied revocation. —

Such an alteration of the estate may be either by the act of the devisor, by the act of a stranger or by operation of law —

1st. By act of the devisor —

A sale of lands devised to a third person will revoke the devise —

So if the Testator having an absolute estate in the land, alienates the legal estate only, reserving the beneficial interest or equitable estate, this makes a prior devise of the lands void. As if one having devised lands makes a feoffment of them to a stranger to uses of himself in fee, the devise is hereby revoked for he holds the estate by mere limitation. he is a mere purchaser —

So if one having devised lands conveys them in fee and then takes a reconveyance of the same lands. So where one having devised lands made a marriage settlement —

So a recovery of lands to the use of the Testator. The preceding rule applies as well to equitable as legal estates. As if the Mortgagee having devised his equity of Redemption conveys it in trust for himself the devise is revoked —

Thus the Testator gone state during his and held that a man devised in fee thinking he had only an estate tail suffered a recovery in order to confirm his title yet the effect a Revocation —

Gow: 184
Do: 566-611
1 Bos: 576.7
7 R: 899 —
1 Bl: 376

Gow: 568

Do: 192
Do: 576
1 Roll: 92
Bro: 399
Ves: Sr: 417
1 Burr 1960
7 R: 299 —

Gow: 576
1 Roll: 116
Dyer: 143
& 60: 90
1 Bos: 576
Gow: 569 —
1 Atk 576
1 Ves: 440

Gow: 570
2 Atk 327
3 Bals: 8
1 Bl Ch: 177

Gow: 572
2 Atk 741, 803
Bro: C. C. 154
1 Eq Cas. Ab 611
2 Freem: 202
1 Burr 1961
Contra.
Gow: 722

Real Property - Devise

Instead of the last rule the following should have been inserted,

And alterations in the estate devised which was not devisable before but becomes so by the devisee revokes the devise. as where tenant having devised conveys to B.S. for the purpose of having reconveyed the use to himself in fee. the recovery is suffered but the devise is revoked -

Gow: 583
3 Leo: 108
3 Atk: 163
Co: 803-
2 Vern: 526-
7 Mk: 406-
Co: 706 -

So if a man covenants to suffer a fine to the use of such persons as he shall name in his Will and makes his Will, and then levies the fine in pursuance of the Cont. the Will is revoked. and the rule is the same tho. the alteration made is declared to be for the purpose of giving effect to the devise provided the devisee is entitled as a Purchaser -

Gow: 656-
2 Atk 379
Moore 789
1 Roll: 614
2 Mk: 678
Co: 999. 399

Will if a man seised in fee. Will supposing he has an estate only. suffers a recovery to confirm his Will it is revoked -

Gow: 582. 3
3 Atk: 808
2 Vern: 523

A specific devise of a lease for life is revoked by a subsequent surrender and a renewal of it - The same rule holds as to a release for years that is renewable -

Gow: 583-
1 Mk: 576-
2 Co: 168
3 Co: 163-
Gow: 585-
2 Atk. 593
Ca: Chy 319-

But leases for years being chattel interests may pass by devise notwithstanding the renewal of them subsequently. if proper words are used for that purpose. ex. if I devise all my estate which I shall have in such a lease at my death -

3 Atk: 174
Salk: 237
1 Mk: 578
Gow: 589-

So if the renewed leases in cases of this kind are not complete at the death of the Testator the previous disposition will not be effected by the surrender -

Gow: 592
2 Atk 593-

Real Property — Devise

And where the revocation depends upon the accomplishment of an alteration in the estate independently of any intention to revoke, there must be an actual and substantial alteration or there is no revocation — Thus it was formerly holden that if one devised lands in fee and afterwards covenanted to convey to a stranger, the devise was not revoked by the Court — Gow: 493

But now as Courts of equity consider an executory agreement to carry devises as an actual conveyance, such a conveyance or agreement will in equity be a revocation of the covenantee has a right to a specific performance — Gow: 494 S.H: 395 Do 629

But a devise of an equitable interest in a Trust estate is not revoked by a change of Trustees, there are no alterations in the estate devised i.e. in the equitable interest — Gow: 495 1 Ch R: 23 2 Do: 107

So if one devises contracts for lands devises it and then completes the purchase it is no revocation the equitable interest is not altered. — Gow: 596 ~~1 Ch R: 23~~ ~~2 Do: 107~~ Boug: 684 Do: 691

So if the Mortgagor devises his equity of redemption and the Mortgagee reconveys the legal estate to a Trustee for a Mortgagor it is no revocation. Boug: 684 Do: 710 Gow: 597

And it is laid down as a general rule that if one has an equitable estate in fee and devises and then takes a conveyance of the legal estate, the devise is not revoked, there is no alteration in the estate devised — Gow: 599 1 Sid: 311 2 Vin: 679 1 Roll: 616 7 J.R: 417

When several instruments taken together constitute but one conveyance a devise made in the interval between the execution of the first and the Bla H: 605 Do: 706 Gow: 600 1 B.R: 251

2 Burr 1131 4 Burr 1962 completion of the last is not revoked. for all the parts of such a conveyance will be considered as constituting one whole by reference to the instrument.

Dow: 602 1 Ves: 196: 3 Keble: 354 A partition between tenants in common and co-parceners. if confined to the object is no revocation of a previous devise by one of them. there is no alteration in the devisors estate, it merely ascertains what before belonged to him or to the heirs.

Dow: 603 1 Vels: 309. 3 Atk: 742 743. 58. But if the deed of partition extends to any other object than that of partition only. it will revoke a previous devise as if it contained further disposition of the estate.

2 Bl. R: 705. 5 Atk: 741 2 Ves: Jr: 479 Do: 595. Where one has made an actual alteration in the estate before devised. no parol testimony is admitted to shew that he did not intend to revoke for the revocation is not founded on any supposed intention to revoke, it is an arbitrary conclusion from rules of positive law presumptio juris de jure.

1 Roll: 615 2dly Acts in fact amounting to an implied revocation of a prior devise may be by an intended alteration in the estate devised. as if the devisor attempts a disposition which is ineffectual either for the want of formality or the want of capacity to take in the person to whom the disposition is made.

Dow: 604. 5 Do: 565 Moore 629 Dow: 108 As where one having devised lands makes a feoffment, without deisin or having devised a reversion makes a grant of it.

Dow: 607 Do: 608 A revocation thus effected being founded on a presumed intention to revoke the inference may be rebutted by parol. as where the devisor on executing a deed of feoffment to his own use, declared his intention not to revoke.

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So an intended revocation which becomes ineffectual through an incapacity to take in the person to whom it is made. Thus one having devised to A. afterwards devises to a Corporation. this is a revocation tho the Corporation can not take — 1 Roll 615 / Eq. Ca: 359 / Bro: P.C. 450 / 9 Mod: 190 / 10 Mod: 287

So a subsequent ineffectual grant to one who can not take is a revocation as the Devisee is well — Gow: 600: 10 / 3 Atk 72 —

2nd An alteration made in the estate devised made by the act of a Stranger may be a revocation as if one having devised is disseised and dies before re-entry — Gow: 612, 652 / 2 Vern: 441 / Gow: 612 / 1 Roll 116 / 11 Co: 67 — / Robt: 740 / 5 66. 675 — / Gow: 612 / 1 Roll 615

But a Stranger can not revoke a Devise by tearing or cancelling it. if it remains legible — —

3rd An alteration in the estate devised for a time is a revocation. may be by mere operation of law. thus a Devise made and not consummated before the Statute of uses. is revoked by that Statute — — Gow: 612 / 2 Ves: 690 / 1 Roll: 113 / Dyer 142. 3

A Devise may be revoked absolutely or conditionally. in whole or in part. and if it be revoked only in part the rest will stand — Gow 614

Of Conditions & particular Revocations

A Mortgage in fee. tho in law an absolute revocation of a prior devise is now considered in equity as only a Conditional revocation (protem), i.e. to the amount of the debt secured. so if the Devisee will pay the debt he may take the land — — Gow: 614 / 1 Roll: 616. 17 / Dyer 143 a / 1 Vern 339 / 1 Salk 154 / 3 Atk 74 & / 3 Atk 803 —

So if the subsequent conditions were an absolute conveyance that he might sell the land and satisfy the debt and account with the heir at law for the surplus. Gow: 619 / 1 Eq: Ca: 410 / Freem: 111 / Pr. Ch: 192 / 2 Atk 14 & 272 / 2 Vern: 441 / 3 P. W: 344

But a Mortgage for a Term of years is even at law only a revocation of a Devise in fee for the time the term so passes

Real Property- Devise-

Pow: 617. 8
Vern: 156
7. J. R: 100
3 Ath 748

In equity it is only a conditional revocation pro tanto, so that the devisee may take immediately on paying the debt-

Bro Ch; 514
Pow: 618
~~2 Ves: contra~~
~~2 Vern: 117~~
~~2 Ves: 600~~

But a mortgage whether in fee or for years only is an absolute revocation as well in Equity as at law of a prior devise and a mortgage is inconsistent with it-

That a Mortgage in fee is no revocation see 6 Ves: Jr 666 2 Ves: & Vern: 117. 600

Pow: 623. 4
1 Salk 616-
Two Car: 23-

Revocation pro tanto may either diminish the quantity of interest devised or the subject matter- Thus if one devises in fee and afterwards lets to a stranger for life. the devise only goes on the estate for life is during the life of the lessee-

Pow: 624
Comyn: 90

If one devises an estate to B in fee and afterwards devises the same estate in Fail to B. the second devise revokes the former to the extent of the difference between the two-

Pow: 624

If one devises an estate conditionally and afterwards expunges the Condition. the condition only is revoked. the devise is absolute-

Cro Jac: 69
Pow: 626
5 Ves: Jr 656
3 Ves: Jr 417

But a release to a stranger is only a revocation pro tanto of a former devise. Yet a lease of the land to the devisee to commence from the devisors death is a total revocation. the devise and lease are inconsistent-

Cro Jac: 49
Lo: 646

But a lease to the devisee to commence during the life time of the devisor is no revocation for it may determine before the devisors death and so stand with the devise-

As to the revocation diminishing the subject matter. if one devises 3 manors to B and then revokes

as to one. the devise is good as to the others. One devises lands to his daughter and afterwards on her marriage settles the same lands on her. the devise is good as to the rest. 2 Vern: 720 Bow: 621. 7 Mod 617 1 Eq: Ca Ab 412 2 Eq: 711 2 Atk 268

Of Revocations under the Stat of Frauds: 29th Car: II.

This Statute provides that no devise shall be revoked unless by some other will or Codicil in writing declaring the same to be revoked - or by burning, tearing or cancelling, or unless the same be altered by some other will or Codicil in writing signed in the presence of three Witnesses or more declaring the same to be void - Bow: 678 Stat 29 Car 2

It is holden that the Statute extends not only to devises of lands strictly so called but also to legacies of money charged on the lands. both are to be revoked in the same manner - Bow: 630 2 Atk 272

It does not affect in these revocations i.e. such as are affected by subsequent inconsistent dispositions as marriage and the birth of a posthumous child - Bow: 630 Barth: 91

It relates to express revocations only. the former remain as at Com: Law -

Revocations under the Stat may be by some other Will or as prescribed in the first branch of the clause or by burning - as prescribed in the other - Bow: 631

In pointing out the first modes of revocation the Stat seems only to be declaratory of the Com Law except that the words Will or Codicil in the first branch of the revoking clause is construed to mean such a Will as would keep lands within the prior devising clause for a will of lands not complying with that would be void - Bow: 47. 632

Real Property — Devise —

Where the instrument contemplated by the last branch not being referred in the Constructions to the words Release, in the devising clause, is construed to be an instrument of revocation merely, therefore not requiring the solemnities prescribed in the devising clause, or those prescribed in the third branch of the revoking clause —

Pow: 677. 8

Pow: 651.
Co: 649. 667
1 V. R: 643
11 Mod: 467
Pre Ch: 460

For if it complies with the requisites in the devising clause. It is effectual according to the first branch of the revoking clause. but if it is attended with the requisites of the branch of the revoking clause it is good according to that clause —

2 Atk: 272
1 Eq. Ca: 407
Pow: 648
Co: 632
3 Mod 288
Comp: 79
1 P. W: 248
Pre: Ch: 549
2 Vern: 741

But if the latter instrument is intended to be a disposing or revoking one. it will not be effectual unless it conform to the disposing clause i.e. attested in the Testators presence. for the intention is to give to the second devisee what is taken from the first. or rather to take from the first only what is given to the second —

1 Ves: 17 —

A devise to the Testators heir at law. Is absolutely void if duly executed revokes a former devise —

But a disposing and a revoking instrument need not comply with both clauses if it conform to the devising clause. the revoking words are effectual within the first branch of the revoking clause. Indeed it as good as a disposing instrument. it would be effectual to revoke impliedly without words of revocation. i.e. it would revoke at C. law

Pow: 629.
Co: 652

Revocations by burning, tearing, obliterating &c remain as at Com Law. and to effect a revocation thus way. it is necessary that the burning &c be by

the Testator or in his presence. or by his direction -
There is no revocation if it is intelligible -

Suppose the devise is destroyed. It has been a question whether the contents could be proved. Mr G thinks there is no case of the kind. Note the analogy to a deed lost or destroyed by time -

2 P.W.: 157
2 Vk. Ble: 260
1 Keb: 16
Stra: 11 266

Revocations effected by these acts are in the nature of implied revocations at Common Law, here the acts themselves thus done by the Testator himself are not considered per se as revocations. but as furnishing evidence of an intention to revoke -

3 Keb: 508
Gow: 633
Cowp: 52
1 P.W.: 346

They are signs of an intent, of course they are equivalent or not as they are done animo revocandi - as if the devisor should throw ink enstead of sand over the writing, or having two devises. should by mistake cancel the wrong one. this is no revocation

Gow: 634
3 Keb: 508
1 Burr 2512
Do: 2515

But it is not necessary that the devise should be wholly destroyed. even the slightest tearing with an intent to revoke is sufficient. as where one slightly tore his devise and threw it into the fire but it fell off and was not burnt. but he declared it should not be his note -

Gow: 637
2 Vk. & B: 1043

So if there are two parts of a devise. and the Testator burns tears or obliterates one part animo revocandi. that will be a revocation of the whole -

Gow: 637
1 P.W.: 346
2 Vern: 742
Cowp: 49 -
Bac: Abr: 461 -

These acts depending for their effects on the ~~Testator~~ intention of the Testator. amount in some cases only to a dependent relative revocation. i.e. where there such reference to another not intended to effect

Bow: 637. & 8 Vin: 140 18 Bi: Ba: 409 2 Bo: 773 3 Ch: A: 155 10 A: 343 4 Burr 2513 Comyns: 451

a new disposition, the revoking effect depends on the effect of the other act, as when one thinking a new devise of his estate was complete when in fact it was not, tore off the seal from his old one, and on being informed otherwise expressed his regret and as he never completed his second devise, the first was held not to be revoked —

Comyns 612

A will obliterated in part by the Testator animo revocandi may be good as to the other part as where one having devised all his estate to A. except in a after words struck out the exception — the part not obliterated remained good —

An instrument made under the revoking clause of the Statute is not valid for that purpose unless there be a signature of the Testator on the face of the instrument unless that signature was intended by the party to give authenticity to the revoking instrument for the name of the Testator inserted in the body of the instrument in a applicable to particular purposes will not amount to such an authentication as the Stat: requires —

Bow: 649 3 Lev: 86 —

Republication —

A devise if not actually obliterated or destroyed may also revoked be revived by a Republication for being ambulatory till the Testators death. It may be rescinded suspended enlarged or contracted as to its operations at the pleasure of the Testator and as previous to the Stat of frauds - parol declarations were sufficient to republish —

Bow: 652 —

Republications at Com Law were very much favoured and of course very slight words effected a Republication —

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as if one having made a devise of his lands should purchase other lands and then declare his first will as his will. this is a new publication to make the new purchase pass —

1 Roll: 618
Jow: 652. 3.
Bac: 143
Stiles: 344
Co: 418
2 Moor: 498
1 Roal: 81 —

So if one having devised all his lands to his executors and afterwards purchases other lands and should be applied to, to sell the latter and should reply he should not sell and that they should go with his other lands. the devise would be republished and the lands would pass —

9 Vern: 204 —
Jow: 655
Cro: E: 499
Co: 498
Moore: 409
2 Chy R: 72

According to one report of the Case the Testator saying on application as above "My will is in my desk," "in my hand," or "in my study," it was holden sufficient. So "My will is in the hands of P.S." has been holden sufficient —

Jow: 655 —
2 Chy R: 27
2 Vern: 269
2 Show: 408
1 Roll: 617 —

So a subsequent feoffment to the use of the feoffors will was holden to be a revocation, yet the reference of the feoffment to the devise was holden to be a republication and thus to gain effect —

Jow: 586
Co: 656
1 Roll 617
Com Dig: 130

But the subsequent appointment of uses extra, and giving a legacy was holden to be no republication of a devise of lands —

Jow: 656
1 Roll: 618
Co. Co 16 —

And it has been holden that the same addition of a Codocil taking no notice of a devise was a republication because the very act shews that the Testator contemplated the devise as subsisting even where the Codocil relates to goods only —

Eagles
Cro E: 493
1 Roll: 618
Bac Ab: 405
Jow
Jow: 656
Salk: 180
3 P.W: 152
2 Vern: 209 —

But the latter opinion seems to be that the mere addition of a Codocil or the execution of one

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not actually annexed. and though it relates to personal property only will amount to a republication of the devise for it is a part of the last will and testament whether expressed so or not. since therefore furnishes conclusive evidence of the testators considering his Will as existing and then being made in addition to it - and of course no confirmation of it so far as it does not revoke it - As to this question under the Stat of Frauds see the authorities in the margin.

Pow: 66 & 1 Ves: 148 — Pow: 667 2 S.K: 621 Contra 1 Ves: 6 & 442 Pow: 661 Cowp: 3 & 1 Bo: 15 & 9 Mod: 68 1 Ves: 443. 89 3 Ch. R: 329

At any rate the annexing of a Codicil or the execution of one not annexed if it expresses expressly the devise will be a republication as Ratify, confirm &c

So it seems any expression in a Codicil shewing an intention to confirm will amount to a republication as Devise this writing shall be a part or further part of my will, —

Pow: 665 1 Ves: 448 — 1 Ves: 446 —

Of Republication since the Stat. 29 Car. II. —

Neither the English Stat of Frauds nor our own makes any express provision as to the republication of devises but as the effect of republishing is the same as that of devising it is holden that no Codicil or writing can amount to a Republication of a Devise of Lands unless it comply with the requisites of a devise —

1 Vern: 329 Pow: 30 & 60 Bo: 604 2 Eq. R: 354 1 Sch: 162 9 Mod: 78 Burn: 192

Parol Republications are not good —

No Codicil says Powell can amount to a Republication unless it complies with the forms and is signed sealed and delivered in the presence of three or more Witnesses

Pow: 664 1 Vern: 344 — Cons. 3 & 1/60 9 Mod: 68 Hobl: 74 & Bo: 252 —

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Quere. Must the Testator sign in the presence of the Witnesses? It is not necessary in the original Devise the Case cited by Powel does not warrant the position that the Codicil was thus executed and holden good tho such execution was not adjudged necessary — the Codicil indeed should be published in the presence of three Witnesses —

But the operation of this Statute does not extend to implied or constructive revocations and some publications seem to be out of the Statute likewise where ever the analogy holds — Pow: 666

So devises by Lessees are not affected by this Stat. i.e. terms for years are a personal property. Under the Stat as at Com Law it seems no express words of confirmation are necessary to republish the Devise if it is sufficient of the Devise is virtually confirmed — Pow 667 Co: Ca 693 1 Ves: 68 9

So also according to the better opinion every Codicil to a devise tho not annexed and even tho it disposes of personalty will amount to a Republication of executed according to the Statute — Thus one devises a real estate and afterwards executes a Codicil giving pecuniary legacies merely but executes it at distance — Pow: 679 — Comp: 381 & Mod: 78 J. J. R. Pow: 668 1 Ves: 484 Burr: 564 Contra 2 Vern: 621 1 Ves: 482

If one having devised all his copyhold purchases the remainder then to be the use of his Will. This remainder is a Republication and the Letter made pass — Comp: 130

Quere. Whether such republication is effected by the Stat of frauds. The effect of the Republication is to give the Devise a new date so that the devise after publication will comprehend all such property and all such persons as would have comprehended if originally made at the time — 1 J. R. 193 1 Co: 601 Pow: 674 Comp: 130 Co: 156 —

Real Property — Devise —

Comyn: 130
1 T. Raym: 264
2 Vent: 213

A devise not republished a will not extend to any estate which the devisor had not at the time of making it —

Dyer 674
Cro Car: 498
Moore 604
+ Dyer 674
2 T.R.: 204
4 Mod: 78
1 Ves: 442
1 T.R.: 492 —

Hence if one having devised all his estate in A, purchases other estate in A and then republishes the latter will pass — So also having devised all his real estate +.

Dyer: 675 —
1 T.R.: 273 —
3 Keble: 847
1 Co: 68 —

If one devises to his son A who after wards dies, and the testator after wards has another son of that name and then republishes. he will take —

So if one devises lands to his daughter (not to the controul of her husband) she then having a husband and after wards the husband dies and the will is republished with no notice of his death this extends to any subsequent husband —

1 T.R.: 195 —

But the effect of a republication extends no further than to give the words of the devise the same operation as they would have had if original at the time of the republication — Hence if one devises lands called A and purchases lands called B. and republishes B will not pass —

Dyer: 676. 264

So having devised all his lands in A, he purchases lands in B and republishes —

So also words intended in the original devise as words of limitation cannot by republication be made to operate as words of purchase. As if one devises lands to A and the heirs of his body, and after A's death republishes. A's son can not take —

1 Vern: 122
Cro C.: 422
Dyer: 343
4 T.R.: 601
Dyer: 676. 606
Raym 408
1 Mod 276
2 Co: 313
Doug: 337
1 P.W.: 394 —
1 Bac: Ab, 219 —

So where one having devised his lands to his son B. and gives a legacy to his Grandson B. republished

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after his sons death. it was holden that the Grandson could not take the Land for the Testator having used the word Son shewed that he did not intend to devise unto his Grandson— Gow: 678 3 Mod: 318 1 Vent: 340 Hayd: 408 2 Lev: 243 2 Show: 68

Observe the intention of the Testator is to be collected from the Date of things at the time of making the will. and not at the time of the death. — — Vgls: 279 Salk 464 1 Atk: 581

A Codicil may republish a devise as to part of the subject matter only. as one having devised his real estate to two. revoked it as to part of the estate by settling part of it upon one of them, and then by Codicil made it subject to the settlement. and it was holden that the other part should go to the other two. — Gow: 679 2 P. W: 329 —

But a Codicil can not give the original devise any validity. which did not belong to it before — Its effect is to set it in the same Condition in which it was in the exception — Hence if the devise itself is not executed according to the Statute a Codicil which is thus executed confirms it — — Gow: 680. 102 110 — 1 Vern: 556 297 Cart: 35 Rob: 742 3 Mod: 262 1 Burr: 656 Bro Eby 270

Lord Hardwicke once said (obiter) that if a man devises a thus "All the leases which I now hold" and afterwards revokes it. those leases will not pass by republication for the words have the same effect as if the devise had been made at the time of republication — Gow: 685 3 Atk: 176

A devise may be republished by a mere execution and such republication may supply original incapacity in the devisor. as if an Infant makes a devise and executes it after he is of full age — Gow: 686 1 Ves: 162 1 Cable 189

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Devise —

A Republication is the same in devises as in Equity but the inaccuracy of Reporters (who are very apt to say a thing is so and so in equity, tends to mislead the student and make him imagine there is a distinction —

Pow: 687-
Cont: 132-

Of the Jurisdiction of Courts over Devises. —

2 Cent: 589-
Pow: 688.68
1 Roble: 50
1 Vent: 207
Bro Cas: 396
3 Viale Ab: 315

Ecclesiastical Courts have no jurisdiction of devises of lands merely and a prohibition lies agt them to prevent them from proceeding in the case of a devise —

Pow: 681.705
2 East: 557
1 Rolle: 316-
1 Lev: 141
Bro Cas 396
Bro Cas 348
Mod: 180
Salk 553-
Comy: 114
Salk 556-
6 Co: 23 —

But if the same instrument contains a devise of lands and a bequest of a chattel it may be proved in these courts for it is necessary as to the personal estate but the probate is as to the real property of no value it is not evidence at Com Law —

As to the personal property it is conclusive. A prohibition was formerly granted as to the lands: 1 East 556 Rolle 315

Pow: 675. 170
3 Atk: 17-
1 P.W: 548
1 Ves: 183
2 Atk: 324
Do: 424
2 P.W: 270
2 Eq Ab: 421
1 Eq Ca Ab: 404
3 Bro: Cas 188
Do: 386-
Pre: Chy: 123
Seems a devise.
Pow: 692
2 P.W: 270 -

The distribution of an estate testate or intestate is under the order of probate settled. the proportion of those entitled to it. Unless it is shewn on appeal to be erroneous. but has no effect on the question of title. Courts of Chancery will not set aside a devise on account of the suggestion of fraud in making it. for if the suggestion is true there is no devise. and whether there is a devise or not is a question of fact to be tried by a Jury on the issue devisavit vel non —

Pow: 695-
3 Atk: 544
1 P.W: 286 -

So whether the Testator was Compos mentis is a question to be tried by a Jury —

Pow: 693
2 Atk: 224

An issue devisavit vel non is sent out of Chy and a verdict for the heir in the case on the issue being found the Court of Chy proceed to try the devise

the trial being but for that purpose as does the proceed in Equity Cases –

But there is a difference between Chancery setting aside for fraud and the taking away from the Devisee the benefit of the Devise – The latter may be done for here the existence of the Devise is not questioned but the Court decree that the benefit of the Devise shall stand for the benefit of the party aggrieved – Pow: 696 Bobt. 189 109 or 199

The ground of jurisdiction is distinct from that over the Devise itself – It is over the Conscience of the Devisee – Thus if A agrees to give B £100 in Bank bills in consideration of B's devising lands to his heirs and the Bills were forged A can be made trustee for B's heirs – for the breach of conscience which in Equity is a fraud – Pow: 696 1 B. R: 288 1 Vern 699 –

And on a similar principle it is holden that if being about to provide by Devise for his younger Children he is dissuaded from it by the heirs promising to make the same provision the heir is compellable in Equity to perform his agreement – Pow: 697 See Eq: 4 –

Also where one devises lands to be exchanged for College lands for it and the College would not exchange – they would decree that it shall have the lands which were to be exchanged – Pow: 699 – 2 Ves: 8 & 9

In general questions arising simply on the words of a Devise are to be decided at Law – But they may decide questions of this kind if there are circumstances requiring equitable jurisdiction – Pow: 699 1 B. R: 296

When the issue devisavit vel non is directed out of Chy – the Court will mould the evidence to admit

Real Property — Leases —

the application of it so that a fair investigation of it may not be impeded — Thus the Court may decree that one of the parties shall produce certain writings and deeds. that he shall not set up such and such an unserviceable defence. or that he shall and not as evidence a copy of the original Lease instead of the Lease itself —

18. Vt: 296
Pow: 706 —

Of giving a Lease in evidence at Law —

The best proof of a Lease is the production of the instrument itself — and regularly the best evidence is required in all cases. and where an action is brought on a Bill in Chy exhibited by the heir and on producing and reading the Lease it was holden to be no evidence —

Pow: 702.8
2 Keble 85
Do — 92
1 Keble 117
Comb: 343 —

So a Lease exemplified under the great seal is no evidence to a Jury in ejectment —

Pow: 702
Comb: 46 —

So the probate of a Will in the Spiritual Court is no evidence as to a title of land. for as to that part of the decree relating to the Lease the proceedings are coram non judice. Hence the probate of Lands in the Court is not evidence even if the Will is lost. for such probate is a nullity —

Comb: 248
Pow: 703.
2 Lev 732
Do: 742

But it is said that a probate of a Lease ut supra accompanied with other circumstantial evidence is admissable if the Lease is proved to be lost —

Pow: 706.7 —

If the decree remains in Chy by order of the Court a copy of it is admissable for it is a rule of the Court. Indeed when the Ct with which it is lodged has jurisdiction over the subject matter an office copy may be read —

1 Keble 117
Gilb: Ex 174

But if proof of the alteration is required - that must be proved by the subscribing Witness if either of them is in being - this is a fact not provable by a Copy -

If there has been a Probate of the Will in Chy is not that conclusive evidence of the fact? Pow: 708

At law one of the Witnesses is sufficient to prove what else the rest have attested - but he must be able not only to testify that not only the Testator executed but that the others attested, otherwise he does not prove the execution - on this subject the Devisee may be read - Pow: 708, 716 Hei: 1252 1 B. Ch: 741

Since tho the Witnesses are all present it is not necessary that they attest to the Testators executing and publishing - If it were so an obstinate Witness might defeat the Devisee and therefore if was proved to be his hand and that he sat as a Witness to the Will, it is held sufficient -

Pow: 709 - 1 Bla R: 365 - 1 Burr: 2224 Hinson v Hinson 613

But the Testimony of a subscribing Witness as the Devisee - If they deny their own subscription the Devisee may prove it by other Witnesses. The same rule applies as to the Testators seal by - Gib: Ev: 264 Pow: 711 1 Bla Rep: 365 Bulstr: 244 Str 1096 Doug: 732 Skinner 79 -

On the other hand there evidence in favour of the Devisee is conclusive vs the heir -

But the Court of Chy will not direct an issue to try the sanity of the Testator when the subscribing Witnesses swear that he was sane - unless the suggestion to the contrary is supported by concurrent evidence - Pow: 702 3 Atk 287

Of proving a Devise in Chancery -

It is universal in Equity when a title

Real property — devise

to real property depends on a devise to prove it in Chy especially if it is of a modern date —

Pow: 714

The probate of a devise in Chy is in effect conclusive upon all the parties and persons and prevents its being disputed even in a Court of law —

Pow: 718
1 Bells: 216

If the heir or any other devisee person should after the decease attempt to controvert it Chy will issue an injunction against him —

Pow: 715-
Co: 716
3 P.W: 192-
3 Atk 27 -

But Chy will not decree a Will to be proved unless the heir is forthcoming i.e. to be found — It has been holden however that such a probate of a devise is not necessary in order to establish a particular claim under it even in equity —

Tho' the heir absolutely makes default yet the devise will not be declared to be well proved, of course proof must be made as if it were contested —

Pow: 718
1 Bells: 216
1 Ves: 177

The probate of a devise in Chy being thus conclusive — It is an established practice in Chy never to decree a devise proved unless all the subscribing Witnesses are examined for the heir has a right to claim that all of them testify before he is disinherited —

In Court It is the practice of Probate to declare a devise proved on the oath of one of the Witnesses but here the probate is no evidence of the Fact —

2 Ves: 459
Pow: 719 n 19
1 Atk 624
2 Vern: 174

And the rule is the same in Engd if one of the Witnesses is beyond sea — his hand writing cannot be proved for it is presumed to be in the power of the party claiming to produce his evidence —

Real Property - Devise -

Where a Commission issues from Chy to take depositions to prove a devise, the devise itself is delivered out of the proper office, on security given, and in some instances Chy has ordered the prerogative Court to deliver it out on security - Hut 961 1 Atk 624 2 Do 627 2 Keb 611

A bill to perpetuate the Testimony of the Witnesses to a devise will not be by a devisee to prove the Will of a Lunatic in his life time - because such devisee in the life of the Testator has neither issue in re nor [illegible] nor has he at the time of the Bill brought and probably he may never have any sort of right for the Lunatic may recover from his Lunacy and make another Will - - 1 Pow: 120 - 1 Vern: 103 - 18 Ves: 362 -

Ena -

Lex Mercatoria — by James Gould Esqr.

The law merchant has usually been denominated a particular custom. But it is manifestly incorrect. for there is no one branch of the law merchant confined any particular district. But another consideration which proves that it is not a particular custom is that it need not be specially pleaded. Again. except in new cases in which the general custom is not ascertained the law merchant is never proved by witnesses. and yet all particular customs are so proved.
and here they are not proved as matter of fact to the Jury. but to inform the Court.
Again the law merchant is not to be tried by a Jury

1 Bl. C. 75
Salk. 125
2 Burr. 1214
1 Bla R. 294
3 Burr 1669
4 T. Rep. 208
Doug. 92. 3-658-

The law merchant was originally confined in case of inland bills of exchange to merchants only — i.e. no person except a merchant could avail himself of this system of law. It is now confined to no class of persons — but governs a particular class of transactions — thus the realm —
It results then that the lex Mer. is no other than a branch of the Com. Law and not a particular custom.

3 B & A 96
2 B & C 459
4 Bl. 467
2 Ld Raym 1545
2 Vents. 295
310-

Bills of Exchange and promissory notes —

A Bill of exchange is an open letter of request from one person to another requesting him to pay a sum of money to a third person or to any other person whom that third person shall direct — or to the bearer — —

2 D. C. 466
Chitt Bills 3-

These instruments were invented

Key 13 to 17
Chitty 87 - for form of Bill -

to facilitate distant remittances.

1 Wilson 190
3 Burr 1517
1527
2 B. C. 467
Chitton 47-107
108

It follows from this description that a Bill may be drawn payable to A or order or to the order of A. or to A. or Bearer — or to bearer generally — even in each of these cases of that the legal negotiation of a Bill. It is a Bill of E

The person who makes the Bill is called the Drawer — the person to whom it is addressed is called the Drawee before acceptance. and after the acceptance the person to whom it is made payable is called the payee even if he directs the contents to be paid to another the latter is called the Indorsee — and any one who has possession of the Bill is called the holder for the time being —

1 Lloyd: 4
2 B. C. 467
1 H. Bla. 646

1 H. Bla. 602 — Chitty 1: 13 —

Indeed it is substantially nothing more nor less than assignment to the payee of a debt due from the Acceptor to the Drawer —

A Bill of exchange differs from a common draft — or order by being negotiable. The only reason why drafts are not bills of exchange is that they have not the operative words of transfer. i. e. they are not negotiable —

A negotiable instrument is one in which the legal as well as the equitable interest may be assigned to a third person not originally a party. The negotiability of an instrument then is that quality in it which enables the legal as well equitable interest to be transferred.

When the legal interest is assigned the assignee may maintain an action on it in his own

Lex Mercatoria Bills of exchange-

name- But when the equitable interest only is assignable. the assee cannot bring an action on it in his own name and he takes it subject to all the equities between the original parties- and the assignor may discharge it- 7 J.R. 248- 3 Do- 182 4 J.R. 342- 5 Do- 683 1 Tb. Bla 602 Chitty 184-

This negotiability is opposed to the rule of the com law in relation to choses in action- which generally cannot be assigned- The meaning is that the legal interest in the debt vested or secured by the instrument cannot be assigned- This rule still prevails in mere transactions but mercantile ones- E.G. A Bond made payable to A. is assigned to B. B cannot maintain an action on it in his own name- and so in a variety of cases- 1 Salk 265 a note 1- 232 b nos 1 2 B.C. 442 4 Wilson 211 Chitty 5.6.108

A consequence of the com law rule is that the obligee or the party claiming originally may release as well after the assignment as before- i.e. the legal interest he may release- So that was the com law on the subject- that the purchasing of a choze in action incurred the guilt of maintenance- But now the purchase of a Bond or Covt. is no misdemesnor at the com law- and such purchases will be protected by Equity if for a valuable consideration- And if the obligor has notice of the assignment and is released from payment by assignor equity will compel him to pay it over again- 7 J.R. 663 1 Vesey 411.12 3 B. Atkins 199- 1 Bac 157- 2 B.C. 442 2 Vern 428- 540- 595. 692

In Conn they have determined that an action for fraud in favour of the assee of a chose in action- after the original debtor if he takes release- provided the assignor is insolvent- And Mr. C. Atherton the

action would lie. if he was not insolvent -

And in Eng. the contract of asst is good not at law as between the parties. This amounts to a complete demolition of the old common law rule as between the parties. This contract of asst amounts to an implied court on the part of the asser that the asser shall have the use of his name to recover the debt. and of the asser receiver the money. the asse. may have in Eng. an action of court broken as here. You see then the contract is perfect between the parties.

2 B. & Ald. 462
2 Ald. 125
1 Dow & R. 317
2 D. Ray. 668
1242.
3 Keeble 364

A choze in action may be assigned by bare but it is usually assigned by venting. The same remedy of court broken would lie in this case - In court they bring an action on the case -

2 T. R. 670

Indeed now the equitable interest of the asse of a choze in action is for several purposes recognized in a ct of law. Thus it has been determined that the asst of a choze in action is a sufficient consideration for a promise to support an action at law.

1 Rolle; 29.
1 Anderson; 212
2 Bl. Rep 820
Chitty; 5.

A person it has been determined that the assee of a Bond having become bankrupt may state maintain an action on it in his own name for the use of assignees. Thus is another instance where asse is protected in a ct of law.

1 T. Rep; 619

And it has been determined that in an action on Bond given to Plff in trust for A. a debt due to Plff from A. may be pleaded as set off.

1 T. Rep; 621
2 T. Rep 630.
Esp Dig 222

Lex Mercatoria. Bills of exchange-

But this rule is questionable somewhat - see as in the margen -

7 T. Rep 663 -
1 Keyd 108
Carth 5
2 Vent 309
Chitty 97

The negotiability of foreign Bills of Exchange was recognized in the 14th Century and that of inland ~~Bills~~ in the 17th. - Thus far as to the com law doctrine of the assgt of choses en action

Generally in all actions for simple contract 7 T Rep: 387
the Plff must prove a sufficient consideration 10 C 330
that as to action on specialties it is otherwise. 1 Keyd 47 -
But in actions of Bills of Exchange that they 5 T. 115. 6. 183
are not deeds it is in general unnecessary Chitty on Bills 9.
for Plff to prove the consideration. A being 3 Salk 70 -
here presumed. It has in this respect one means 1 Bla Rep 487
incident of a deed. - This is a general rule only. 1 Keyd 496
and applies to notes as well as to Bills of Ex- 2 Bla. C. 645
change. 2 Doug 758 -

But to this general rule there is an 3 Burr: 1516.
exception where the Plff claims as bearer of 1523 -
a Bill under circumstances of suspicion - 2 Shower: 235
Thus if payee has lost the bill and another person Chitty 9. 51
claims recovery on it - he may be required to 201 - 209 -
prove that he gave a valuable consideration for it. This exception is well founded. But where he received it from the loser by giving a valuable consideration for it. he must recover. - but the lender cannot. -
But this exception cannot hold as to the original payee or where it is indorsed to another because where the indorser had lost it it appears from the instrument that he is entitled to it -

Chitty: 51-
1 Bla Rep: 445-
1 Esp Rep #17. 19
1 Term: 674
1 Lyd: 276-7.

On the other hand the Deft is not generally permitted to prove that he received no consideration for it - except when it is between him and the immediate privy. There can be no probability of injuring a stranger by proving a want of consideration between those who are not privies - Indeed it never been question'd from a case in Cairnes whether a want of consideration could be proved between the immediate privies. In the case in 2 Cairnes the Ct say there is no judicial decision to warrant the doctrine above laid down -

2 Cairnes 246
Forrests Ch: 186
Dec 2.
2 T. Rep 71

March 9th.

There is an exception to the above rule - for where one takes a Bill either by transfer or indorsement after payment he may show that he received no consideration for it - and he may insist on any equitable defence of which the holder was aware at the time of the transfer.

B.N.R 83-
Kyd 263-4
Chitty 52. 113

The reason of this exception is that there is a suspicion of unfairness where a transfer is made after the Bill is payable - and it is left to the Jury to infer from the slightest circumstances unfairness in the transfer -
Hence where at the time of the transfer the Bill was noticed for non-payt it is sufficient for the Jury to infer that the party knew the circumstances were unfair -

B.N.R. 82: 3.
7 T.R. 423.

And if it can any way be inferred that the holder of the Bill knew it was dishonoured the rule is the same whether it were noted or not -

Indeed it has been said that the holder never

Lex Mercatoria.

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eng. a Bill after it is payable is liable to all the equity which it was liable to between the parties and then independent upon the nature of the grounds of the defence. This rule is laid down by Buller but I am inclined to doubt whether there is law. 7 S.R. 423 3 S.R. 88. 1 Lyd 268. 1 Wilson 280 2 New R. 170 Chitty: 114

Bills of exchange are of two sorts foreign and inland. Foreign Bills are those which are drawn in one foreign State and payable in another. Inland are those which are payable in the same country in which they are drawn. Bankers checks or drafts on Bankers are in form like Bills of exchange they are payable to bearer and transferable by manual delivery only. These were formerly thought not negotiable but not so now. These instruments are not payable till demand and on demand only. They differ them from such bills as are payable on a particular day &c

These instruments may be declared on and usually are declared on as Bills of exchange tho it is doubted whether they may be protested. They are also treated as cash for they are now considered a medium of exchange. They must pass in a sale as money as cash

If these notes or drafts are not demandable in a reasonable time and the Banker fails the holder must bear the loss. &c. Notes are payable on demand and there is Lyd 10 7 S.R. 423 Chitty: 16.17. 109 171 3 Burr 1517 Chitty 16.46.5 7 S. Rep 423. at supra — 3 Burr: 1517. 19 — 1 Ld Ray 744 Barg: 663 7 S. Rep 423. 1 Bla Rep 1st 1 Ld Ray 744 1 Lyd 41. 2

not done in a reasonable time. It is best right that the holder should bear the loss. What is a reasonable time is now considered a question of law to be determined by the Ct. and not as formerly a question of fact to be determined by a Jury. - The decisions of Jury were found very wavering and contradictory. - It is strictly true that what is a reasonable time is a question of law. But in particular cases it may be a mixed question partly of law and partly of fact. The facts which go to show that the time was unreasonable must first be ascertained before the law can determine whether it was unreasonable. as the ordinary mode of conveyance - how often the mail goes - these are all matters of fact and must be ascertained. and all these facts given it becomes a mere matter of law. The Jury act under the direction of the Court. The question in the abstract is a question of law. In the concrete it is a mixed question.

Lloyd Ll. 2
1 Bln Rep: 1484
1 Str. 415. 550
2 Str: 910. 1176.
Beames L.M 482

There considered the general nature and properties of Bills of Exchange. I am to consider now the parties. It was formerly held that no person except a Merchant could be a party to a Bill of Exchange. It is now settled that all persons having understanding and legal capacity to contract may be parties to a Bill -

Schultz 19-
Carth: 282
2 Ventr: 292
Comb: 152 -
1 Show: 125
1 Salk 125

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Any Corporation also may be parties to a Bill of Exchange - But it must become so by the act of the agent - i.e. only by procuration. 1 Atk: 181 2 Burr: 1216

Any Drawee further deserves that if a Bill is drawn payable or indorsed to himself only encapable to sue himself by it. It is good to all other parties to it. Thus suppose a Bill is drawn by an Infant and afterwards indorsed by an Adult; the latter is liable tho the Infant is not - so of a feme covert's Bill of exchange 2 Atk: 181. 2 Chitty 21.

The original parties to a Bill are generally three these are the Drawer the Drawee and the Payee. Kyd accurately observes that the parties are four. It is not necessary however that there should be three persons - for one person may act in two characters Thus a person may draw a Bill payable to himself or his own order - so he may draw upon himself payable to another person Chitty 22. Kyd 2. 3 - 1 Salk: 130 6 Mod: 29 Kyd: 3 - Chitty: 46.

Indeed there may be a valid Bill with but one actual party. Thus a man may draw a Bill upon himself payable to his own order - & here he may be sued in either of three characters I have mentioned. 3 Burr 1677 Jones: 241 Carth 509

But a person not originally a party may become so by negotiation of it. So too one may become a party to a Bill by accepting for the honour of the Drawer - or the Indorser - this by his mere voluntary act and the acceptance is called an acceptance supra protest - † Becanah. Mr Rep 334 466 Carth 129. Kyd: 155 & 156 Chitty 23. 105. 180

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1 East R 172
Beames 459
Kyd 144 5
Ch: 23. 115. 163. 4

After the Bill has been accepted by the drawee but payt been refused by him. A Stranger may become a party to it by payt. and then is called a payt supra protest.

4 Coke 75 b
2 Ld Raym 930
6 Mod: 36
12 Do 346. 564

A person may become a party to a Bill not only by his own immediate act. but the act of his Agent or partner. who acts as agent for the rest.

Beames Pract
98
Chitty: 24-

Even whenever a person draws accepts or endorses. by an agent. he is said to have so done by procuration.

1 Mod 52 a
Chitty 24

Now as the act of the Agent is merely ministerial. persons incapable of binding themselves may bind others. Thus if a person employs an Infant a feme Covert or even an Outlaw to draw a Bill for him. he is bound by it, - The agent is nothing more than a legal instrument

Beames L. M.
Dia: 86-
12 Mod: 564

And it is settled that an agent may be constituted for these purposes by Parol. as well as by Deed.

3 J. R. 757
1 Esp. Rep 111
6 J. Rep. 591
1 H Bla 155
2 Do - 618-

A General agent may bind his principal to any extent. But a special agent can bind his principal only to the extent of his authority.

Bayley 496-
Selw. Ed: 514.
1 H. Bla 313-
Kyd: 110-
Chitty 25. 56-
Schieffelin Jones Ch 64
Peake Dec 118-

A person by signing his name on a Blank piece of paper and delivering it to another authorises the latter to fill it up to any sum - It is as long as memory of man and unlimited time of Credit - Thus rule does not bind in making Deeds that power can be created only by Deed -
4 Geneses Dig 26 - -

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But an agent authorised to draw or accept cannot delegate his authority to a third person unless he is expressly authorised to do it. A delegated authority cannot itself be delegated. 1 Rolle 330 9 Coke 75

In drawing accepting or indorsing bon a principal the agent must do it in the name of his principal if he does not the principal is not bound and he himself is. The more ordinary mode is by signing A. B. by C. D. his attorney. But this mode is not indispensable. 9 Coke 75 Str. 705 6 T. Rep. 176 Comyns Attly 6. 14 17 Ves. 181 2 Stra. 955 Chitty, 27. 56 75

One of two joint traders may by accep tance in the name of both bind both if the acceptance relates to their joint business, for one of the partners is for this purpose an agent for the whole. 1 Salk 125 Ld Ray 175 11. 84 Salk 292 7 T. R. 207 12 Mod 354 Peake Rep. 16

It is said however that the act of one partner if it relates only to his own sole interest will not bind the other, But this seems questionable — if the holder of the Bill did not know that it was drawn for the sole benefit of the drawer — Mr Chitty thinks this the most reasonable rule Salk 125 Peake Rep. 80 2 Term 277 292 Esp. Dig. 524 Chitty on Bills 28

It seems however that two persons by mak ing a Bill payable to their order make themselves partners pro hac to that transaction and one may endorse for both — Ld Mansfield ended admitted merchts to prove that the indorsement was invalid Halson L. Part 253 Doug 653 Peake Rep. 16 Chitty B. 29

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Ch: 29- If a Bill is drawn upon a Corporation aggregate by one of its members as such does not bind the Corporation- for tho: one partner may bind the rest- one Corporation cannot bind the body politic- It can bind itself only by its corporate act

Salk 126 Ld Raym 175 1 Atk- Doug: 653- Bull N P 30. 56- 75- When one partner draws for himself and partner he should do it "for himself and the other or in the name of the firm- But it has been determined & Court that both partners are bound even without such manner of expression-

March 10 The form and requisites of a Bill of Exchange- No particular form or set of words is necessary to create a Bill of Exchange- The ordinary

Bull N P 31. 5th 3 Wilson 213 Ld Raym 1396 Comyns 81 6th Salk 1: 1.2- 1 Ld-61 2 Ves 629 form is "at such a time, or on demand, pay to A.B or bearer such a sum"- Mercantile instruments are liberally construed- Hence a promise to account for such a sum has been holden a good Bill.

Ld Raym 1545 2 East 559 Bull N P 173- 1 Atk. 190. 192 But the instrument must contain certain essential qualities or it will not operate as a Bill of Exchange- But it is by no means true however that where these qualities are wanting that the writing is good for nothing- for it is still evidence of the promise to pay- An instrument in the legal sense of the term means such a written contract as will support an action or such as is the foundation of the action-

3 Wilson 213 2 Black. 1092 5 T.R 485- 7 T.R 241 A writing without these essential qualities will not carry with it entire evidence of an

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consideration nor rule to be negotiable 17 Bla 239. 242

Of these requisites there are but two. the first is, that the Bills be payable at all events and not upon contingency. 2nd that it be payable in money only. not in money and any collateral article — nor for money and labour. 3 Wilson 213 2 Bla Rep. 1072 5 T.R. 485 7 T.R. 241 17 Bla 239 Stra: 1151. 1271

It is frequently mentioned in the books that the Bills must not be payable out of a particular fund — but this is not a third requisite: but an illustration of the form.

A writing made payable in the the form of a Bills of exchange. on an event which may never happen — it is not a Bills of exchange and of course not negotiable. Because it wants per saltum commercial transactions 5 T. Rep. 485 3 Wilson 213 1 Burr 325 Stra: 1151. Hyd: 56.

Also for the same reason a writing in the form of a Bills is made payable out of a particular fund which may never be produced. this is not a Bills and of course not negotiable. Every Bills must contain a promise credit to the drawee — 2 Raym 1362 1 Bl. 1566 3 Wils: 207 Bla Rep. 782 Stra: 592 451 12 Mo. 346 Ves: Jr 240

It seems however by some opinions that such a writing may be declared upon as a Bills between the original parties. There are contrary opinions. but the former seems the better opinion. None of the evils can arise between the original parties and no harm can result from such a Bills if not negotiable. 9 Mo. 243 Chitty 33. 48 5 T. Rep. 485 6 T. Rep. 123. 2 Bla Rep. 1072 Hyd 58. 65.

But to the general rule there is an exception where the event on which the payment is to be made is of necessity, - morally certain. and respects trade Stra 24 1 Wilson 262 3 Ch. R. 272 Hyd 57

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Thus a Bill is negotiable if it is made payable three months after date, that is read off -

Stra 1217
1 Burr 226
Lyd 57-
Chitty 33. 34

As if the event on which the Bill is payable is one that must certainly happen at some future time however remote. the Bill is good - Thus a Bill payable 6 months after the death of A. do too a Bill payable when A an infant shall be of age pointing out the time when that will be, is good. because event though A. should not live till age - it is considered payable at that time -

Salk 132 - 762 -
2 Ld Raym 1481
Bamfield 12
Comy 571

Tho a Bill is made payable out of a certain fund. yet if the mere mention of a fund out of which the drawee may reimburse himself then does not negotiate the Bill - for it does not depend on the precarious events of the fund for its payment -

2 Ld Raym 1545 -
7 Mod Rep 783 -
Chitty 34

The rule is the same as to Bonds inserted in the Bill to found out the consideration of acceptance Thus where a Bill was drawn thus pay to A at such a time such a sum value received out of my estate at B -

Chitty 34
Lyd 50 -

The second requisite is that it must be payable in money only. Hence it cannot be payable in goods labour, Bills of exchange were devised for the remittance of money and were not intended as the medium of barter. Besides this might operate extremely hard on the party bound -

Show 127 -
Lyd 50
Chitty 35

A bill payable partly in money and partly in labour is not good - nor in money and any collateral security -

10 Mod 287

Any order which cannot be complied with

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in any part but by the legal of money. is for money only, exclusive the meaning of the rule —

If a Bill is made payable on future event even that event happens, the it has not the requisites of a Bill may be used as evidence of some contract between original parties even if the rule before said above is correct. It may be declared on as a Bill of exchange. 2 Bla Rep 1072 Lloyd 6 C.

In the case of foreign Bills it is usual to make three of the same tenor and date. To avoid a loss. But to prevent the paying three times each one should import that it was a triplicate and refer to the others. The Bill should always point out the payee by the name or otherwise. But it is said that if the Bill does not designate the payee either by the name or otherwise but means him of whom the value was received. she should be considered the payee — Chitty 45. 6

Chitty 46. 7 Pothier

This rule seems questionable 1 H. Bla 608 n

It is settled that a Bill may be made payable to a fictitious payee. It has been settled that such like by the case of Gibson & Minet is an legal effect a Bill payable to Beemen. as to such parties who knew that the payee was fictitious — but as to those who did not know that the payee was fictitious it entirely void. These Bills have been highly censured. and it has been doubted whether the indorsers were not be liable for forgery. 3 T. Rep 174 1 H. Bla 313 2 Bos. 194. 288. Lloyd 208. 227 Chitty 47. 8

And a Bill may be payable to one person for the use of another. The nominal payee will have the power of transferring the Bill. Carth 5. 2 Vent 307 6 D. Rep 123 Lloyd 108 1 H. Bla 313 Chitty 2 vol. 112

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Beawes 3 -
3 Wilson 211
2 Str: 212
2 Wilson 353

Every Bill to be negotiable must contain operative words of transfer. the words or order or bearer or tantamount are indispensable. The aforesaid words are bearer and order. A Bill made payable to A and assigns is negotiable by endorsement only - so one to A or bearer is negotiable by manual delivery

Carth 403.
2 Strange 1155
Keyd: 1085
Chitty 15. 134

and a Bill payable to the order of A - is the same thing in effect as if A were payable to A or his order -

2 Strange 1155
Ld Raym 1464
3 Wils: 212
8 Mod: 267
1 Mod: 310
Fortes: 282

The words value received are usually inserted in a Bill of Exchange - but are not necessary, nor in the indorsement for in both these cases there is sufficient evidence of a consideration -

Str 910
Keyd: 71
Chitty 50. 93. 4

But to enable the holder to recover Interest and damages vs the drawer and Indorser in default of payt these words are necessary by the Stat 9 & 10 W. 3d and 3 & 4 Ann -

1 Esp Nisi: 261
Peake Nisi: 61-
216
2 Caines: 2186

If a Bill is for accomodation only and that fact is known by the Indorsee at the time he received it he shall recover no more than he paid for it even tho it is less than the nominal value mentioned in the Bill -

1 Bla Rep 445

In sale cases when the deft can avoid the payment of consideration he may prove it illegal - and sometimes he may prove it illegal when he may not the want of it -

Doug 614. 636
Keyd 280

Both sides agree to illegal considerations when those parties immediately concerned. the illegality of the consideration is always a good defence

1 Esp Nisi 166
6 T. Rep 61-
1 Bak Rep 6-
Contra -

and even then a person knowing the consideration to have been illegal at the time he received it

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can never recover upon it.

If however a third person having put his name upon a Bill at the request of the holder has been compelled to pay it he can recover back the money he has paid. He is a mere volunteer and has right grows out of the fact that he has paid. Peake 215 Chitty 523

In general any holder of a Bill upon a fair consideration and having no knowledge of the illegality of the original consideration can recover upon it. This rule presupposes that the Bill has been negotiated. Any subsequent knowledge of the illegality cannot affect him. Hy 280 Doug 614 or 63 E. 1 T. Rep. 300 3 T.R. 80 to 83 4 B.4. 587. 7 J.R. 607. 8 Bac 590 1 Bla Rep. 455 Strange 1155 Hy 283. 4

This is the general rule to which there is an exception. Where a Bill is transferred after it is due. the last can derive the illegality of the consideration and then is on the party to infer his knowledge of it.

There is also another exception of one having act the holder in cases where the statute declares the Bill to be void. Thus where the Bill was on usurious consideration or where it was given for money won at gaming - a bona fide holder cannot recover on it. Doug 646 or 670 2 K. Bla 647 Strange 1155 Carth 356 1 East 92 1 Esp. 171 274

The distinction then seems to be this. If the consideration is illegal the holder, bona fide, may recover on it. but where it is void by statute he cannot recover. But suppose a Bill given for Burglary or for any immoral act the bona fide holder can recover. this it would be bad between the original parties -

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The true reason of this destruction is that when the Stat. law declares the instrument void if even a bona fide holder could recover. the Stat would be of no effect. even the party intended to be protected would be oppressed & would stand exp for only by transfer of the instrument. the Stat could be evaded. But in case of the instruments founded on considerations illegal at C. law. the law is not defeated by transfer. & the Statutes enterviene such Purchasers be found to run thro all the cases. I think our text writers are not correct when they speak on this subject. because cases occur where the Stat has declared an instrument void. yet if the party would not be oppressed. I think he could recover.

When this course of reasoning is pursued by another rule which is that even when the Stat law declares the Bill void. there can be a recovery between the Indorser and Indorsee. The reason is that one which I have mentioned. that the evil intended to be remedied is not let in.

Stra 1155 Carth 713-16

Chitty 83

Chitty says that the innocent indorsee can recover only of his immediate indorser. But this Position is not to be law. He cites no authority. If he had cited Lord Mansfield's rule with regard to Bills received by mistake. delivery only. it would have been true.

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On the other hand if a Bill is good in its creation and is indorsed on a usurious consideration and then passed to a bona fide holder. without notice. the holder can recover vs the Drawer and Acceptor but not vs the Indorser for he is the party entitled to the protection. 1 Bos & Pul 92 / Doug 296 / 3 T.R. 690 / Bac Abr 273

In every Bill the Drawers name must be either written or subscribed in the body of the instrument by himself or his agent. prior by authorised. Chitty 55.6 - & Mod 307. / Beawes L. M. Pla 3 - / 2 Ld Ray 1376 / 1542. / Stra 399. 609

The construction of Bills is very liberal. compared with that of Deeds. even though when for money which the Drawer acknowledged to have been borrowed and received he gave a note never to pay - it was held that he was bound to pay. This was a mere trick 2 Stk. 32.

And it is upon this principle of liberal construction that a Bill payable to fictitious payee. operates as one payable to Bearer -

In general the Contract is construed according to the effect according to the laws of the Country where it was made - i.e. the lex loci governs. Thus where a note was given at Leghorn payable in London and afterwards the Drawer was discharged in Leghorn. when sued in London. it was held that he was not liable. Stra 733 / 1 B. & Pul 141 / 2 Vesey Jr 444 / 2 H. Bla 603 / 100-126. / 7 T.R. 242.

There is an exception to the rule however with respect to the time of payment mentioned

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Bearnes L. M. Pla: 251 Chitty 59 - on the Bill for that is regulated by the law where the Bill is payable. Thus where a Bill is drawn & indorsed - payable on a Monday at Hamburgh. Here the law of Hamburgh must be appealed to the usages of Hamburgh

1 B & P: 138 - Chitty: 60 As to the remedy upon a Bill the form of it &c and must be according to the law of the country where it is brought - but the extent of the right of the parties is regulated by the Lex loci -

12 Mod 517 6 J. R. 52. 9 J. R. 64 - 5 J. R. 513 - 1 Esp. Rep. 106 Com. Dig. Tit. Merc. F. 17 - A Bill when drawn must to take effect ~~must~~ regularly be delivered to the payee - and a person receiving a Bill for a former debt for which he has not a higher security cannot in general sue for the original debt - till the Bill becomes due because he impliedly gives a credit to the drawer till that time -

4 J. R. 320 5 Do: 367 - 2 Vb. Rep: 141 1 Anstru: 225 If a Bill is altered in the hands of the payee or other holder without the consent of the drawer he is discharged even as to a subsequent bona fide holder But the alteration must be an essential one - and when the alteration is made the Bill is not the act and deed of the drawer - The acts of the Bills being genuine every holder must run -

Bearnes L. M. Pla: 194 et supra - Chitty 63 The rule is the same as to an acceptance when the alteration is made after acceptance and so to the drawer if the alteration is made after indorsement -

But the rule is otherwise as to a bona fide holder where the alteration was made before acceptance or indorsement - (the party altering can never recover ~~but not~~ but not at all -

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But the consent of any party to a Bill make estop him as to denying the Bill - But the party making the allowance can never recover. 4 T.R. Ref. 320 - Chitty 63 - 11 Co. Rep. 27 a

Of the obligation incurred by the drawer.

The drawer by the very act of drawing and delivering the Bill implies that the drawer is legally capable of binding himself by acceptance that he is to honour as described in the Bill and that on due presentment he will accept and that he will pay on presentment for payment.

Chitty 70 to 72 Chitty 63. 64 - Hyde 108 7 D Rep 7 Ky D 104. Bay 55. 2 H. Bla 378 1 Bos & P 511.

These engagements are all implied and extend not only to the payee but to all the holders - the obligation follows the Bill thro all its stages of negotiation -

The payee may however assume Chitty 122. 109 these risks himself - and then discharge the drawer 3 T.R. 757 - but the drawer would be liable to another person 1 Esp. Ref. 447 who was ignorant of the assumption of the payee 7 T.R. 65. 6 - and the rule is same to be the same. When the drawer discounts the Bill with the payee.

If there is a breach of any of the engagements just mentioned the drawer is liable immediately, even tho the day of payment has not arrived for the amount of the Bill - and in some cases for damages. Costs and Interest - 2 H. Bla 379 Bayley 55 - Beames 469 - Chitty 64. 100. 136 1 Burr 669 - 3 Burr 1687 - 63 Ref 52-139 - 3 Wilson 16. 17 -

The drawer incurs these obligations whether the Bill was drawn on his own account or another's and the obligation continues even tho the drawer is prohibited or prevented by the laws of a foreign country from accepting Beames 469 Ky D 100 2 H. Bla 378 Ky 117. 156 Chitty 64

The holder may lose the benefit of due diligence by his own neglect. To entitle the holder to the benefit of these engagements on the part of the drawer he must do his duty. When acceptance is necessary the holder must present the Bill to the drawee. In some cases presentment is necessary and in all cases it is expedient of the holder receives the Bill before acceptance. Where a Bill is payable on demand after sight presentment is necessary. for if it is never presented it is never due.

1 H. Bla 565
Chitty 67-86
202
1 Ld 117

But in other cases it is not necessary that notice and engagements to the holder to procure a Bill. In these cases it is not a matter of duty but only of policy.

Beames Ple 266
1 J. Ref. 712.
4 Burr 2670
Ld 118.
2 Show 496.

Else even where the general rule makes it necessary that the Bill should be presented, the holder may excuse himself. by showing that the drawee or Drawer had no effects of the drawers in their hands. or that he was insolvent. and that the party knew it. and that the party has suffered no injury from the non-presentment.

2 H. Bla 336
569.
Chitty 66-102-
182-202-3.

March.

Per rule as to the time of presenting a Bill for acceptance where it is necessary.

is that the holder must use due diligence. i.e. that he must present on a reasonable time.

Beawes Ple 229.
1 Ld 117. 18
2 H. Bla 569
7 T R Ref 425
1 T Ref 167
514
4 T R. 148.
Bond 515

And here Pegasus observes that what is due time is a question of law.

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Mr Chitty by mistake lays down the same rule with respect to a Bill payable at sight. The presentment and payment are simultaneous. There is then no necessity for presentment for acceptance. It is true that [illegible] must be made in a reasonable time. Chitty 67, 8

Presentment should always be made in the usual hours of business else it is not a legal one — Keyd. 123. Chitty 69. 148

But a neglect to present in a proper time may be excused as by illness of the holder and by other causes Ld Raym 284

So seems in strictness that the drawee ought to accept or refuse immediately on presentment. It may be left with him 24 hours that he may have opportunity to examine accounts between himself and drawer unless he voluntarily accepts immediately. Beawes Pla: 17 Com: Dig: Merch F. 6 Keyd: 126. Chitty 70. 72

But this is usual to leave the Bill 24 hours for the purpose mentioned & yet the holder cannot sue them if the mail goes out before that time by which he might serve notice of non acceptance. Com: Dig. Merch F. 6 Supra Chitty 70

If the drawee is not to be found where the direction is given or if it appears that he never resided there, or that he has absconded the Bill is considered as dishonoured. 1 Ld. Raym 646 Ld Raym 742 Beawes Pla 29. 29 Keyd 125. 127 Chitty 70. 89 125. 136

But if the drawee has merely removed to another place and has not absconded the Bill is

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Ld. Raym 1087 / 12 Mod. R 544 / Chitty 70 a 135 b — dishonoured. And the presentment should be made at the place where he lives. and should always be to the Drawee himself. But the holder is not obliged to follow him out of the Kingdom or State. but if he cannot be found by due diligence the presentment may be made at his house or last place of abode.

Collier 146 / Chitty 70. 71 / 132. 136 — If the Drawee is dead. presentment is to be made to his personal Representative if he can be found within a reasonable distance.

And what is a reasonable distance I think it a question of law. The rule is not indeed laid down but I think it is.

Chitty 71. 5. 6. 200 — Acceptance itself is the act of engagement by which according to the tenor of the Bill. and thereby may either in writing or parol and thus too may be by an authorized agent of the Drawee. and the Drawee is bound by such acceptance. But the holder is not bound to acquiesce in the acceptance of an agent.

Chitty 71. 2 23 — It multiplies the necessary proof on his part. it may be fraudulent. it may be forged. It seems then very questionable whether the holder is compelled to acquiesce in the acceptance of the agent

Beawes Re: 267 / 1 Esp. Rep: 145 / 269 — Acceptance for one partner for both binds as both.

B. & P. 222 / M. & S. 297. / Beawes 224 / Chitty 29. 73 / 112 — But if acceptance be by one of two who are not partners. and even tho it is in the name of both. there is not acceptance for both. and the holder is not bound to acquiesce in such acceptance. and may consider the Bill dishonoured.

Chitty 63. / 71. 2 — If the Drawee is found to be an Infant or Feme Covert the Bill is considered dishonoured and the Bill need not be presented. because the implied

enjoyment on the part of the Drawer is violated.

And a promise to accept in future may operate as an acceptance for the present even tho by parol. Thus where the Drawer on leave the Bill and Drawee accepted it was holden an acceptance. B. & P. 270 Comyns 573 3 Burr 1663 1 Atk 64 5 East 514

Indeed it is a general rule that an undertaking or promise to accept in future is a present acceptance.

And a promise to the Drawer to accept a Bill to be drawn in future is good if attended by such circumstances as induced the third person to think that he would accept the Bill. Thus where on answer to a letter the Drawee drew & would accept your Bill. and this was shown to the third person this was held a good acceptance. Comyns 571 573 5 T.R. 1 East 94 Doug 74-81 Bacon's Ab 454 466 1 Atk 64 611-615 3 Burr 1165 — 76

Acceptance after the day of payt will bind the acceptor but in such case the Drawer and Indorser may be discharged unless they had notice of non acceptance on the day. 12 Mod 410 Chitty 93-94-261

And in such case the acceptor becomes liable to pay on demand. But they cannot be payable according to the tenor. 2 Ld Ray 864 5 T.R. 1 Salk 127 129 Cowp 426 Com: Dig: 75 12 Mod 410

Under the english Bankrupt laws the Drawee the having effects of the Drawer in his hands is not safe in accepting, if he knows of the Bankruptcy the Drawer for the effects belong to the assignees of the Drawer they being the owners of those effects by the laws — 2 H. Blo 388 7 T.R. 711 Chitty 74-152

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If having accepted without notice of the Bankruptcy and having paid the money that the holder be is not liable - even if after acceptance he receives notice he is not liable.

Pothier 47 Chitty 23-74 103. 180

The acceptance may be either absolute conditional or partial - But the holder is not bound to - acquiesce in any other than an absolute one. If he acquiesces in either of the others the acceptor is beyond by it

Stra 214 - 646-1152-1194 1202. Comb: 452 - 2 Wilson 9 - 1 J. Reb: 182

If the holder is satisfied with a conditional accept tance or one varying from the tenor of the Bill - it may be so accepted even if he gives notice of the nature of the acceptance to the prior parties they are not discharged - But if he does not in this case give notice they are discharged because in common presumption they holder and Indorser suffer an injury. -

18 Rep 182. 186 Chitty 73-5

And what amounts to an acceptance is a question of law - exactly as what is a reasonable time -

Kyd 74 Chitty 75.

An absolute acceptance is an engagement to pay the Bill according to the tenor and it is not necessary that the acceptance should be expressed to be absolute -

A partial acceptance is not very common and not very clear - because the proof is difficult.

Chitty 73-5

The form of the written acceptance is "accepted" with the name of the acceptor signed But the bare word accepted - or the bare name is sufficient.

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When a Bill is made payable on a certain day generally it must by the acceptance be made payable at a particular place or house in A. or the holder is not bound to require it in A. This is for the convenience as a security of the holder- — B Mary 574 Com Rep 75

In general any act of the Drawee evincing his consent to comply with the Drawers request is sufficient acceptance. Thus where he wrote Recd. presented. the day of the month and even the words on a distinct piece of paper any thing of this nature as it refers to the Bill - is good acceptance. — Comb: 410 B.N.P. 270 Keyd 80- Bosanquet; Bills of Exch. 8.4

And a verbal acceptance the merchant considers a transaction is good as to the holder - but want of consideration would be good defence as the Drawer- — 3 Barr 1669 Chitty 77. 82

But a promise to accept obtained by fraud or misrepresentation does not bind the acceptor. But the Holder must be considered as the party who practices the fraud. But I think when it is transferred to a Bona fide holder the acceptance would be good as to him - even the acceptor would have his remedy as the party practising the fraud - — Chitty 77- 3 Barr 1669-

A written acceptance from what has been may be on a separate piece of paper - and an acceptance by letter is binding — Stra 648 Keyd 69-

And an acceptance may be constituted even when there is no writing on the case, but to constitute such unlitten acceptance there must — Bos & Pul. 17- Chitty 78- 76. 77- Hard: Ca: 75-

Lex Mercatoria - Bills of exchange -

17 Rep 269. Is some act or circumstance to endorse the holder to be bound on the Bill as accepted - Thus where drawee said here is your bill - that was held acceptance -

1 Stk 611 Hogue Ca 278 Chitty 77 - But an acceptance may be implied from the circumstance that the drawee keeps the Bill a great length - But that may be rebutted - as that the drawee had been sick &c -

B & P 270 Ld P 80 - And in generally any act that gives credit to the Bill ensures encourages the holder not to protest it will amount to an acceptance -

Poll Ca 47 Ld P 161 Chitty 23, 76, 78 & 81. 103 - 180 - An engagement to pay the Bill on some contingency is called a conditional acceptance. The holder is not bound to receive this acceptance and he must give notice of the nature of the acceptance to the prior parties or they will be discharged - But even the parties are discharged the acceptor will not be - e.g. accepted to be paid as soon as goods certain are sold - accepted to pay on such a ship when in cash for her cargo is a conditional acceptance -

Stra 1152 1212 - 2 Wilson 9 - 12 Mod 244 - Comyn 571 - 17 Rep 182 -

How it may be asked is this rule reconcilable to the former rule that the Bill must be payable at all events - It is payable at all events altho not withstanding such acceptance - The acceptor is indeed not bound at all events but the drawer is -

Stra 212 Comyn 571 - 17 Rep 182 Such acceptance becomes absolute the moment the event happens -

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If the acceptance is on condition the condition intended should also be in writing - for a parol condition would be of no avail between the acceptor and a subsequent bona fide holder if he took it without notice of such condition. Bayley 286 & 286 Hardres or Hardwick - 1 Q. B - Chitty 61 -

A partial acceptance is an unconditional acceptance but varying from the tenor of the Bill - Thus is an engagement to accept for part Str. 214 Comb. 452 - 11 Mod: 190 Str. 1194 or for a different time and place. or a part in money and part in goods -

This choice of acceptance the holder may refuse even tho' the Bill is dishonoured - But if he receives it. the acceptor is bound by it. and the prior parties must be notified. as before -

Chitty 61. 2.

If on conditional or partial acceptance. the holder gives no notice to the prior parties of non-acceptance generally. he waives the acceptance for he thereby does that he does not require it -

Whether an acceptance is absolute conditional or partial is a question of law -

March 11th 1812.

By an absolute acceptance the drawee is bound to pay according to the tenor of the Bill. by a partial or conditional one to the extent of his acceptance. 17 Ves. 182 - Chitty 82. 85. 157 - 17 Ves. 174

An acceptance is binding in favour of a third person that was made without consideration even if this circumstance was known to him. 1 P. Wms 181. Doug 18. 7. 8. 3 B. Ves. 183 4 D. Ves. 339 -

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2 H. Bla. 622
3 Wilson: 1st
2 Atk: 1260
2 Burr: 1228
1 T. Rep: 487 -

An acceptance on a recd. bonus by the drawee & or will bind him in favour of either person even if he has no effects. Indeed the acceptance is an admission of effects to the amount of the Bill. And an indorsement by an executor tho without any consideration has the same effect as to any third person -

Dougl 47 -
1 T.R. Bla 88
Chitty 663

The obligation created by an acceptance is irrevocable, & the acceptor cannot be discharged except by satisfaction and waiver on the part of the holder -

Atk 783 -
Chitty 5th Ed 83 -

If the acceptance is made in a foreign country by the laws of which it originally is or afterwards becomes invalid it is of no force here. The lex loci governs as to the nature and construction of a contract -

Dougl 47
Chitty 8th 197
Doug 247 -
or 236 -

But an acceptance may be waived or released by the holder even by parol without deed or writing. Mr. C hardly knows how this law has crept in the Mercantile law. But it is well settled -

Doug. 1st Ed.
Chitty 84
Dougl 47 -
1 Ld: 154 -

It has been held in one case that what amounts to a parol agreement to discharge the acceptor is a question of fact. But this seems to be overthrown for it has been held that nothing but an express consent will discharge - and this must be a question of law -

2 D Ray 65
5 T.R. 14 - 664
5 Coke: 70. b

If the holder of the Bill executes to the drawee a release before acceptance that does not discharge the acceptance afterwards made - Because a release operates only to discharge

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an existing liability -

A parol agreement between the acceptor and holder to consider the acceptance as at an end, has been held a parol discharge - & where a message was sent by the holder to the acceptor that the business was settled between himself & a drawer, & that he need give himself no further trouble about it - has been held a waiver - Bayley: Bill

And an entry in the holders Book against the entry of the Bill in these words "Acceptance annulled" has been held a discharge

It has been considered a doubt whether the holder releasing a part of the Bill from the drawer to prin. Bayley: 264 - Chitty 64. 156

& not by discharge of the acceptance - But in this case there can be no hopeful injury to the acceptor for he is the first person liable - 7 Wheat: 262 Esh Rep. 517

It has been determined that an alteration by the holder of a partial into an absolute acceptance and on refusal to pay an alteration relating to do any mere form - is not a discharge of the first acceptance - Thus is going a great way - and is contrary to the general rule of the Com. Law - & Mr G thinks the relaxation is not the act of the acceptor - Beawes Re- 222. Malay 28 L.J. Rep: 336 Chitty: 485 -

When a future consignment to the acceptor and a prospect of profit on it are the consideration of the acceptance - & the taking a Bill of lading is a discharge of the acceptance for the consideration is thus removed by the act of the holder himself - Chitty 85 -

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Peake 187. 1 Esp. Rep. 178 And where the holder agree with the acceptor if the latter would make affidavit that the acceptance was false, it was held that the acceptance was discharge[d] even tho the affidavit was false - for the acceptor complied with the covenant & it was not part of the agreement that such should be true

1 T. R. 182. And a conditional or partial acceptance is discharged by notice to the former parties of a general non-acceptance.

2 Show. 1195 If the drawee by his acceptance makes the Bill payable at a particular house and the Bill is not there presented - the acceptance is discharged if he thereby suffers any d[amage].

Beawes 465 1 Wilson 185 Salk. 130. 1 Ld Raym 8[vo] Lloyd. 166 - The act of acceptance when there is nothing in the terms to the contrary, imply that the drawee has effects in the hands of the acceptor and the drawer is afterwards obliged to pay - he has his remedy vs the acceptor - the onus probandi lies on the acceptance

1 Ld 166 6 Mod. 163 1 Salk. 209. 205 If however the acceptor has in fact no effects of the drawer in his hands at the time of the acceptance and pays the Bill he has his remedy vs the drawer as for money had & received to his use - But the onus probandi lies upon him.

1 Wilson 187 1 Salk. 129. 131 1 Ld R. 166 - As to all the other parties except the drawer the acceptor is considered the first debtor - he is the first liable - This is evident from the nature of a Bill of exchange -

If the holder makes the acceptor his Executor and then dies. the acceptor is discharged even if the acceptor is discharged the drawer and Indorser are of course discharged. The reason of the discharge in case of the Exr. is that the right and duty unite in the same person. But as between the Executor and the Creditors of the holder this debt in equity may be enforced. 1 Salk 122 / 1 Lowd: 184 / 5 Ld 3 - / Salk: 299 - / 2 Bla: Ri 811 2 - / 3 Do: 18 -

The effects of non acceptance and the duty of the holder when the Bill is dishonored.

When a Bill is presented whether necessary or not. and acceptance is either wholly refused or made conditionally or partially notice must be made to the former parties (as it is) otherwise they will in general be discharged. 5 Barr 2670 / 1 D. Ref: 712 - / 1 Bentr: 45 -

It was formerly holden that any of the former parties insisted on want of notice as defence he must have proved that he received injury from such want of notice. But this rule is now done away. But the holder must now prove that the former party when he sues him has not sustained damages by the want of notice & if he can do this he will recover 1 D. Ref 406 9 / 3 D. Ref: 182 / 2 76 Bla 612 / Key 129 -

Hence if the holder can prove that if from the time of the Bill to the time of suit the drawer had no effects in the hands of the drawee there was no necessity of notice for the reason why such notice must be made. Instances in such cases 1 W. 405 712 / 2 Do 713 / 5 Do 239. / 2 76 Bla 610 / 1 Bos P. 652. / 3 Do - 280. / 2 Esp Rep 515 - / 3 Do 186

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1 Esp 333
3 Do 18 &
7 East 354

But if the drawee had effects in the hands of the drawer. the holder that he has sustained no damage, would not [illegible] the rule is inflexible and peremptory.

2 H. Bla 336
1 East Rep 302
2 H Bla 609.
1 Esp Rep 303.
note:
2 Caines; 343 &
1 East Rep 207 note

It is said that the payee of a promy note - indorsing it with a knowledge of the makers insolvency. cannot defend - on the ground of the want of notice. non payment - This is questionable.

1 Esp Rep 515

It has been observed that if the drawee had no effects of the drawer in his hands. the latter not entitled to notice and the rule is the same as to the drawer tho the drawer had effects in the drawees hands.

1 Esp R 516.

And it has been determined that securities to pay by the drawer with the exception to cause money lent on which no money has been raised. are not effects within the rule. Where is no indebt & Resp

Doug 497 & 645.
17. Ves 408
2 T. Rep: 336
2 H. Bla 612
7 East: 359
1 East Rep: 334 note

But if the drawee had effects in the hands of the drawer at the time of drawing the Bill the subsequent decent knowledge of the insolvency of the drawer neither dispenses with the necessity of notice for the drawer might still have secured himself.

The rule is the same as to Bailees for a valuable consideration. He comes within the same rule as to notice as the drawer.

2 H. Bla 612
336 -
5 D. R 239
1 Dr. 405. 712
2 Bla Rep 849. 824

And the drawee having informed the drawer before the Bill was presented that he could not accept it is no excuse for want of notice. for the drawer might still have accepted

1 Bo & Pullen 662 - 1 East Rep 332. 515.

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If the Drawer has in fact no effects in the hands of the acceptor it affords a presumption that he received no damage from the want of notice According to some this may be rebutted- and according to others it cannot- A case of this kind has actually been had in the Kings Bench but the question was not directly decided- — 2 D. Rep 713-720- Kyd: 131-136 Peak: Rep 203 note- Mestl Bx: 290- Chitty: 87-89

Mr G thinks that want of notice in such case i.e. when the Drawer had no effects in the hands of the Drawee is proper of defence- The main objection is that he had no right to draw upon the Drawee- but this is no crime and he might reasonably have expected acceptance-

It has been determined that if the Drawer or Indorser is a Bankrupt at the time of the refusal of acceptance notice is unnecessary. Mr G thinks this rule not well founded- for the Bankrupts assignees have the same interest to receive notice as the party himself and- — 3 Browns Ch: 184- Cook Bankt L: 168- Chitty 84. 89

If the Drawer absconds as there is no necessity of notice — 1 Esp R: 516-

And the neglect of reasonable notice is excused by the death or illness of the holder if notice is given as soon as possible after the impediment is removed- — Tolhurst Rep 124 Chitty 84-

If the Drawer makes a conditional acceptance the terms of which are to be complied with by the holder. and they are complied with then no notice is necessary.- Thus if acceptor says Pay me if well you inform me of the person for buying over the money.- Then is absconded and notice is not necessary 1T — Chitty 84. 90 101

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Chitty 90. If the Drawee accepts per part of the amount only absolutely, the prior parties are bound to the extent of that acceptance without notice for so far it is absolute. But as to the residue the Drawer would not be liable unless he had notice that so much was dishonoured.

March 15th

The manner in which notice is to be given.

Hyd 136. 142
1 Ld R: 170
Chitty 90

The manner of giving notice of non acceptance differs in case of foreign and inland Bills. in the latter no particular form is prescribed

Ld Raym 993
6 Mod 8.
Salk 131.
2 D. Rep: 713.
& 00 239.

In case of a foreign Bill a protest must be made and without this protest the notice will not avail. This is a rule of publick law. and it is imperative. Protest is indispensable. This form is made indispensable by the usage of nations for the sake of having a uniform rule.

Chitty 90. 1
128 or 136.
Hyd 136

Thus protest in general must be made by a Notary publick. and for the purpose of making this protest effectual. the Notary must present it again in person. and if the Drawee still refuses. the Bill is noted for non acceptance and then it is formally protested. and if the original Bill cannot be had. a protest may be had on a copy of it.

Skinner: 172.
Chitty 91.
1 Shower 164

And as to this protest thus made full credence is given by all foreign Countries. for the Notary is an officer acting under the publick mercantile law.

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The mere noting of a Bill does not amount to a protest of a Bill. It is a mere matter of form- a memorandum from which the protest is made. and it does not excuse the want of a protest. 2 M.L. 913 2 Ld: 175 B.N.P. 271 Kyd 137

This protest is regularly made by the Notary himself and not by his Clerk or substitute 2 M.L. 175 Kyd 137 Chitty 91

If however a Notary cannot be obtained the Bill may be protested in and by any substantial person of the place where it is dishonoured in the presence of two or more Witnesses. The protest must bear the same date as the note of non acceptance - and then must be made in the regular hours of business i.e. between sun rise and sun set. Chitty 91. 6 Kyd: 137/43

The protest must conform in its structure according to the custom of the Country where it is made. For form of protest see Kyd 144. Chitty 92 15 Q. 161

The protest must generally made when the Bill is dishonoured. But if the Bill is directed to one at A. requesting payt at B. it may be made in either place. Chitty 92

And a Copy of the Bill must always accompany the protest. But a Copy of the protest need not accompany the notice of non acceptance but notice of the protest must be given - for that is specified. 2 M.L.: 569 1 Esp. Rep: 511.2 B.N.P. 271 Bent: 45 12 Mod: 309

And it is not necessary to send the original Bill - Chitty 92

With respect to inland Bills no protest is necessary. Any act evincing a refusal of the

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Chitty 93-
6 Mod 195
1 Salk 131
3 Do 69
2 Ray 992

Bramer and proved as facts are ordinarily proved is sufficient

1 T. Rep 169-
Chitty 93-
97. 98

It is said in one case that the notice must express the holders intention not to give credit to the Bramer. But this seems not well founded, and is questionable. All that is necessary to give the prior parties notice of their liability.

Skyc 910-
Chitty 93.4
Kyd 150

Tho by the Com Law a protest on an inland Bill being dishonoured, is not necessary, yet by 9 & 10 Wm 3 & 11th Ann it is necessary to entitle the holder to recover costs interest and damages

Chitty 94-

other than protest when made must be made by the same person and in the same manner as in case of foreign Bills.

Kyd 150-

But notice of non acceptance must be given as well in case of inland as foreign Bills - in default of the first.

2 Vb. Bl. 509
Bennid 199-

In the case of both kinds of Bills notice of non-acceptance sent by mail is sufficient - even tho it miscarries - Potheir says contra - Pla: 48.

2 Vb. Bl. 565

and where there is no mail sending by the first line of coach or any mode of conveyance is sufficient and this even tho an earlier accidental conveyance might have occured.

Poth: 144

As to the time of giving notice a delay may be excused by unavoidable accident as by sickness or robbery - but in general by no other -

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Notice of non acceptance must be sent in a reasonable time. and must be sent to all the parties to whom the holder intends to resort. 2 Bl. 565 Bet 5. 271 Kyd 126-129.

What reasonable time is is a question of law. the parties being given formerly much more time was given than at present. But now notice must be given on the day of non acceptance if there is any post or ordinary conveyance if not then by the next post or ordinary conveyance. 2 D.K. 174 2 Ray 743. 2 Stra 829. 2 Bl. 565 1 T. Rep 168

and if the party to whom notice is to be given resides in the place where the Bill is dishonoured notice must be sent on the day. 1 T. Rep 169 Kyd 126

It was once holden that notice must have been from the holder himself. but now it seems any notice from the drawee is as good and sufficient. 1 T. R 169 Kyd 126 Chitty 98.

And it seems that notice by one party having a right of action on the Bill will inure to the benefit of another party having claims on the Bill. suppose holder to Indorser and he gives notice to the drawer and Indorser. and the Indorser pays. the notice given by Indorser to drawer inures to the benefit of the Indorser. Chitty 98.

And that notice should be given to all the prior parties to whom the holder intends to resort for payt. otherwise they are discharged. 5 Burr: 2670. 1 Vent. 45. 1 T. Rep: 712

I have observed that if the drawer has no effects in the hands of the drawee notice is not necessary. but that fact does not dispense with 1 T. Rep 714 Peake Rep 202-203.

notice to the Indorser for he is liable to be sued peculiarly.

Cowden. If the notice is sent to the Indorser
Stra 441 2 Burr 669 1 Esp. Rep. 334 contra Peake 131. 3 D. Rep 443 want of notice to the Drawer will not prevail
him. tho it was formerly thought otherwise.
Every Indorser is in effect as to every subsequent
holder a new Drawer. - and here the reason of
the rule.

The consequences of a want of notice
Stra 1246 2 D. Rep 713 B. & P. 276. Peake Rep 202 1 Esp. Ri 57 of non acceptance may be waived or avoided
by matter ex post facto. Thus if after a Bill
has been dishonored a prior [illegible] days a part
thus dispenses with the notice or if a party promises to pay. thus admits his liability.

2 Burr 2676. 2 D. Rep 712 - see note - 1 Esp. Ri 334 note - 2 East 469 7 Do 231. 6 T. R. Bull 326 It has been holden however that if the promise is made without a knowledge of the fact of non acceptance the promise does not subject. But this doctrine is exploded. And it is now holden that such promise implies a notice and dispenses an averment of notice in the Declaration.

It has been determined by Kenyon in a single case that a promise by a prior party without a knowledge of the legal consequence of want of notice - is not binding. See Chitty 102. B. 158. the case is not reported. This doctrine is very questionable. Ignorantia legis &c - The uncertainty of the enquiry is itself very strong objection to this rule. The argument ab inconvenienti is as strong as - - Pron - - - - -

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And further they held thereon & determined in the same case. that if the Drawer dy under such circumstances had paid the Bill to the holder. he might recover it back See Chitty at sup.

In case of an acceptance originally conditional want of notice is cured by a performance of the Condition at any time before the Bill becomes payable — Chitty 101. 80.1 Thom 212 Com 571 1 D. Rep 182.

There is a species of acceptance called an acceptance under protest —

When a foreign Bill is protested for non acceptance. it may be accepted before protest. even the Drawer himself may accept for the honour of the Drawer or Indorser. but then he accepts not on the grounds of any liability to the Drawer but as a stranger. Beames Pl 33, Kyd 152. to 156 Chitty 23 103 122. 163. 180 209 —

This is frequently done by the Drawer when the Bill is drawn on account of some reason. even the Drawer is unwilling to accept on his account. but is willing to accept on account of the Drawer or an Indorser — Kyd 152. Beames 456. 1 D. Rep. 269 1 Pow C. 134.

In common cases if the Drawer is unwilling to accept on the Drawers account. he may do it on account of an Indorser and in this case he must give notice to the Indorser Beames P 33, 4 Chitty 103 —

This mode of acceptance by the Drawer operates to rebut the presumption which would arise Chitty 209, 10 Beames: 456 Kyd 156

from a simple acceptance. that he has effects of the Drawer in his hands.-

Hyd 153. 5 Beawes 458 17. Rep 269 — The effect of such acceptance is to give the acceptor his right of indemnity vs the party on whose account he accepts and against all the prior parties upt whom that party would have had a right to recover. Whereas a simple acceptance never gives more than a right upt the Drawer or him on whose account it is drawn. and besides the presumption then would be that he owed him so much.

Mand. 16 Ch —

Beawes Pla: 38 Carth 124. Hyd 153. Bluttly 104 — If the Drawee refuses to accept at all any other person may accept for the honour of the Drawer or any Indorser.

Hyd & Bluttly ut supra — But an acceptance for the honour of the Bill is the same as one for the honour of the Drawer.

Beawes Pla 42 — And the Bill previously accepted by one person for one party it may be afterwards be accepted by another person for another party

Beawes Pla 2. 36 12 Mod: 410 Hyd 156 — It has been said that the holder is bound to receive an acceptance supra protest when made by a responsible person But this is not the rule now for now the holder is in no case bound to acquiesce in such acceptance.

Beawes 457 Hyd 154 — If after an acceptance supra protest the Drawee becomes willing to accept according to the tenor the acceptor supra protest may by consent of the holder permit it. but not accus-

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It is clear that the holder should have the Bill protested before he receives the acceptance supra protest for otherwise that he the acceptor was not the person on whom the Bill was drawn. Chitty 105

This rule I think must be confined to foreign Bills Hyd 153 - Chitty 105

The mode of an acceptance supra protest is this. The acceptor appears before a Notary Public with Witnesses and declares that he accepts supra protest in honour of such a person. He then signs usually A. B. for the honour of C D. but the more explicit, well do with anything more.

An acceptance supra protest is a binding on the acceptor as if there were no protest. This does not vary his obligation to the holder and any subsequent parties, but it does his rights - Pa. 35 Beames 46 - 3 Ray 575 - 12 Mod 410 Com Rep 96 3 Burr 1672 1674

If one accepts for the honour of the Bill he is liable to all the Drawers as well as to the holder. he is liable then to all the persons subsequent to the Drawer - to whom he is not liable - 1 Esp Rep 113 - Beames 457 Hyd 153 -

If one accepts for the honour of a particular Indorser. he is liable to all the subsequent Indorsers but not to the Drawer for whose honour he accepts nor to the Drawer. The extent of his liability is no greater than that of the person for whose honour he accepts. Beames 467 Hyd 153 - Chitty 105 -

Contra As to those parties to whom the acceptor supra protest does not become liable he has a right of indemnity - Beames 467 1 T. Rep: 269 - 1 Com: Ca: 139 - 1 Esp. Rep: 113 - Hyd: 155

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1 Esp. Rep. 113

And here I would observe that an acceptor supra protest is as to the person for whose honour he accepts and also the Indorsers in the character of an Indorsee. He ultimately then becomes in effect the holder of the Bill. A bill is drawn or payable to B- who indorses to C. C presents for acceptance which is refused. D pays. Sues as acceptor for the honour of B- now when he pays this he becomes the purchaser of the Bill and then is the ultimate Proprietor or holder.

As to the transfer & negotiation of Bills.

3 Nelson 211
2 Black: 667
3 Burr 1516 17-
1525
3 Lev: 244-
Salk 125-
12 Mod 180

Bills which are negotiable at all are negotiable in their nature & empowerment. It was formerly holden indeed that Bills payable to Bearer were not so- but the rule has long been settled otherwise-

Where a Bill is not negotiable however the transfer will operate to put not the person making it as if it were so- i.e. if the acceptor cannot recover it from the payee- for in those instances where it will be recollected there is an implied covenant that the payee shall recover from the obligor- the assignor then becomes liable on their implied legal liability-

Salk 125, 7
133-
Holt 117.
2 Burr 1226-
2 Black: 442-

And whether a Bill is negotiable or not is a question of law. It is seen that in new cases the custom of Merchants is to be enquired into- This is sometimes obscure. But there

2 Burr 1216.
1 Black Rep. 295
Doug: 653.
Nelson Law
Part 253 to
257

enquiry as only in the same light that the Ct would refer to a Book.

It is a general rule that a value transfer can be made only by the payee or one who has the legal interest in the Bill. Hence if the Bill is endorsed by a person who has not the legal interest the transfer is not valid. 2 D. Ref. 28 / 176. Bla 607

But if a stranger will volunteer to endorse a Bill the endorsement will subject him to. Indorsee the not to the other parties. Chitty 121.2

Where a Bill is payable to Bearer it may be transferred without endorsement by mere manual delivery. & in the case of it is transferred by a person who has no right the receiver may not recover upt the prior parties if he knew that the person from whom he received the Bill had no right to transfer. But if he did not know then he may recover. The same rule holds in cases of a Bill payable to order. and it is endorsed in Blank. this Blank endorsement is a letter of Credit to the holder. he may fill it up with his own name the who puts his name in Blank on a Bill holds out an offer to the whole world to become liable to any person who will fill it up. 3 Burr 1516 / 1 Do. 452. / 1 Bla Rep. 249 / Doug 611. or Cowper 633. / 2 Ld Raym 743 / Chitty 9. 51. 100. 121.2. 201 209. Kyd 102.

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Stra. 516 - 3 Wils: 53 - 10 Mod: 244

The same rule being true as to the payee or holder and in like manner the right of transfer rests in him as bankrupt

Beames 469 2 B. & Ald 335 - Hyd 107

If the payee or holder becomes bankrupt the right of transfer vests in the assignees and generally from the time of the act of Bankruptcy committed.

Peake Rep 76

If however in such case the holder should have transferred the Bill before the act of Bankruptcy and has forgotten or omitted to endorse he may endorse afterwards for this is completing an executed act

3 Wilson 1 2 Str: 1260 2 Burr 1225 - 1 T. Rep 441 - 1 Ves & Bea 522 - Cluth 111. 2

On the death of the holder the right of transfer devolves on his personal Representatives

Hyd 106 - 6 Mod: 653.

If a Bill is made or transferred to two or more the interest in the Bill and the right of transfer are in each or both collectively - But that interest or right may be transferred by one if they are partners but if they are not partners then otherwise -

Cuth: 6 - 2 Vent: 307 - 3 Ch - 2 Show: 509

If a Bill is payable to A for the use of B - the right of transfer is in A. for B has only the equitable interest.

Where a Bill is indorsed to an Infant and by him indorsed over to another - Query no judicious decision whether or no. that there person can recover the prior property.

Bills are usually transferred after acceptance before payt. but they are not now

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versally true - A Bill may be transferred before it is made. Thus if A. endorses a Blank piece of Paper A. delivers it over to B. B has a right to procure a Bill of exchange on the other side in A's favour. Bonj: 494 Ld Raym 514 1 Bla. 313 - 316. 19 - Cluttg 112. 3 - Ld 869 -

A valid transfer may be made after the time appointed for Payt - but such transfer always is subject to the equities between the parties if he knew of it and according to some whether he knew of it or not - B. N. P. 85 - 700 - 423 - 1 Wilson 230 2 Burr 1516 2 Ld Raym 575

A Note however the party transferring the Bill after it is payable cannot avail himself of the former & subsequent acts of the parties who holds it for a valuable consideration - But Mr Gould thinks the rule ought to be the same between him & the immediate transferee There is no difference - B. N. Rep: 423. Mr 430.

But an endorsement after Payt leaves none of the parties but the person making it: but the rule Pl Com it relates only to those cases where the day of Payt has elapsed & Thus where after Payt by the drawer of the Bill the Bill was endorsed - it was resolved that holder could not recover vs Acceptor 1 Wilson 46 L.d. Ray. 490 1 Bla 89 -

But a Bill drawn in Payt may well be endorsed over for the residue - L.d Ray 360 Cas. t. 466 - 12 Mod 213 - 1 Salk 65 - 2 Wilson 262

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March 17th, 52. The mode of transferring a Bill is governed
1 Ves. Bla 600. by the legal effect or operation of the Bill and not by the terms of the Bill. for there sometimes differ. As in case a Bill of a Bill payable to pretender or payee

2 Ray 442. A Bill payable to A or bearer or Bearer generally is originally transferable by mere
Holt 115. delivery and not by indorsement. The rule is
1 Str. 557. the same as to a Bill payable to A or order after
Doug. 633. 80. 511. A has endorsed the Bill in Blank. But after
Peake Nep. 225 indorsement in blank it may be transferred
1 Burr. 452. by mere delivery.
3 Do 1516
1 Bla Rep. 485

1 Ves. Bla 606 The distinction then is that a Bill payable
1 Bos & Nep. 180. to order is not originally transferable by manual delivery without blank indorsement made out. but bill payable to Bearer is always transferable by delivery.

2 B. Com. 468 These mercantile contracts are all liberally
2 Str. 1173. construed since thus no formal words are
1 Salk. 126. necessary to make an indorsement. Nothing more
128-130. is necessary than for the holder to subscribe his
2 Ray 443 name on the back of the Bill.
Com. Dig. 311.

3 J. Rep. 574 It used to was formerly contended that any written matter on the Back of a Bill unless expressly shewn to amounted to a transfer. but now it is.

The indorsement may be in blank, in full, or restrictive. There are but two forms. Says Mr Gouldsmith - in blank and in full - But P. should follow the usual method -

Ley Mercataria - Bills of exchange -

A Blank endorsement is nothing more than the Endorsers name written on the back of the Bill - This is the most usual endorsement - Hyde 84 Chitty 117 -

But an endorsement in blank does not per se transfer the interest in the Bill but merely gives the holder the power of constituting himself the Endorsee by filling it up with his own name - The usual form is to write over to order 1 Salk 126. 2 Ld Ray 1180-12 Mod 192. 2 Ld Ray 1103 - Com Rep 311 - B. & P. 2 275

An action may be commenced by the holder however before he fills it up - but then must be before verdict found -

A Blank endorsement while it remains so has no certain effect - It enables the holder to fill it with his own name, but he has no right to write over the name of payee any thing that corresponds with the nature of the instrument as power of authority - Receipt &c. But the Hyde 95, 6 1 Shower 163 - 2 Ld Ray 871 Salk 125 - 1 Bla Rep 297

It follows from the last rule that while the Endorsement remains blank an action may be brought in the name of the Endorser. And in this case it cannot be objected that the Endorser has transferred his interest for that does not appear. But after the Bill is endorsement is filled up the Endorser cannot have no action in the Endorsers name - 2 Ld Ray 871 12 Mod 193. 244 2 Stra 1103 Salk 125. 28. 30. Not so in

Kyd 96- & Kyd 67/1 Selk: 130- Aliter where a holder took a Bill indorsed in Blanko. and trover was brot in the name of the Indorser. the holder was admitted as a competent Witness -
Do not discover upon what principles this could be done if the Deft could prove that the Witness had actually the interest in the Bill -

Holt: 296 1 East Rep.: 181.2 4 Do: 210- Chitty 118. 1866 - 201- Peake Rep 225- The negotiability of a Bill the indorsement remaining in Blank, cannot be destroyed by any subsequent indorsement in full - The holder may strike out the intermediate indorsement and bill up the Blanko wh to himself -

1 East Rep. 182 And on the other hand if the Payee makes an indorsement in full in the common form of the a Blank indorsement by Indorsee will make it negotiable from him by mere delivery - for there is a regular chain of title from the holder to the payee -

7 Mod: 89- Bro Q: 611 or 633 6 Ves: 617 or 639 Ed- 1 Atk. 13 Ca 606 But a Bill payable to order is not negotiable by mere delivery unless it is indorsed in Blank by the Payee, or his Indorsee - an indorsement by the payee is as done now necessary to negotiability of such a Bill.

Chitty 118 Kyd 89 Doct. Pla: 22. 24 An indorsement in full designates the person to whom it is made and contains in itself a transfer of the interest to the person named

1 East Rep. 182 order An indorsement in full makes the Bill further negotiable in the first instance only by the Indorsee's indorsement - and the Bill

Lex Mercatoria. Bills of exchange -

can never become negotiable by bare delivery, like some Indorsee indorses in blanks.

The negotiability of a Bill cannot be restrained by the payee himself and of course not by special Indorsement but by express restriction. Com Dig 311
1 Bla Rep 295
2 Burr 1216
Str 557
Doug 617 & 637

The mere omission of the operative words does not affect the instrument for the negotiable quality still remains in the Bill -

Even if the payee indorses in blank and the indorsement means so - it can in no way be restrained by any subsequent indorsement - transferring the interest -

But there are restrictive indorsements - which are those which contain express words restraining the negotiability of the Bill - As if a Bill is indorsed in this form - pay the contents to B - only for my use - This effect is to stop the negotiability of the instrument - Doug 617 & 637
Potter 168
Chitty 119-20

The payee or indorsee having the absolute property in the Bill may limit the negotiability to whom they please - It was formerly that otherwise - that a Bill negotiable in its own could not be defeated by the act of the party; - Thus where the payee says pay to B only - 2 Burr 1227 -
1 Bla Rep 299 -
1 Ld Raym 249 -
1 Show 163 -

or suppose the payee indorses the Bill in blank to B - and B indorses thus pay to C - for my use - here C has no right to transfer for he is a mere agent for B - by the indorsement -

Of Mercantile Bills of exchange —

But Parkhouse in the last case — that if the indorsement the restrictive transfer the interest the rule would not hold — Thus suppose a Bill is payable to B or order. B indorses in blank to A. A promises restrictively to C only. C then indorses to D — Now he conceive that the indorsement to D is good — he may fill up the Blank indorsement to himself — Here the person indorsee has the interest — as if he had he can transfer it — But this is not supported by authority —

Ld Raym 360 Carth 466 — Salk 65 — 12 Mod 213 — A transfer it seems cannot be made after acceptance for less than the amount due on the Bill — The ground of the rule is that such indorsement would subject the drawer to two actions — and perhaps more —

I conclude however that an indorsement after acceptance for less than the amount would bind the Indorser — but this is my individual opinion —

Bac Abr 266 If however the Bill is indorsed for part before acceptance the drawer is bound by it — for he now consents to such division of interest — and thus purchases the preceding rule —

Ld Raym 360 Salk 65 Carth 466 — It seems then from these rules that the drawer can never be subjected by such an indorsement — unless in the case of a Bill indorsed before it is drawn — for in such case he would evidently assent to such divided indorsement

Lex Mercatoria

Bills of exchange—

And as the acceptor is not bound to pay less than the whole sum for which he has accepted the bill, so the indorsee of part to A and part to B is not entitled to sue the acceptor before payment of the whole sum. 2 Wils. 262 2 Ld Raym 1360 1 Salk 65.

And as the indorser is not bound to pay less than the whole sum for which he has indorsed the bill, so neither is he liable where part only is indorsed for the same reason—

because here he would be liable to two actions, yet after a part of the Bill has been paid it may well be endorsed for the residue—for the residue includes the whole that is to be paid—

To complete the transfer the Bill is to be delivered to assignee. This is a rule essential to all negotiable contracts— Chitty 61. 115. 121.

March

The operation of a transfer—

The transfer of a Bill by indorsement is similar in legal effect to the making of a new Bill and the Indorser is in effect a new drawer upon the original drawer. This is manifest from the nature of a Bill— 1 Str 133 1 Burr 674 3 Salk 68 2 Show 461 Lofft 601

And a promissory note when indorsed bears a strict analogy to a Bill of exchange after it is indorsed for the Indorser here too is in the nature of a drawer. this is virtually a direction to the promisor—who then corresponds with the drawee of a Bill—and the Indorsee corresponds with the payee of a Bill—and on this principle of analogy it has been determined that a promissory note when indorsed may be declared upon as a Bill of Exchange 1 Salk 129 6 Mod 29. 30 1 Burr 676 2 Ld Raym 743. 1 Salk 132. 3

Lex Mercatoria.

Bills of exchange.

Hence also the obligation on which the endorsement of a note subjects the Endorser in favour of Endorsee is the same as that to which the drawing a Bill subjects the Drawer in favour of Payee.

A transfer by bare delivery if made for an antecedent debt or for a valuable consideration as for goods sold &c subjects the party making in favour of his immediate assignee to an obligation similar to that created by endorsement.

If then a Bill is transferable by delivery and it is transferred for an antecedent debt or for a debt created in favour of transferee at the time, the party transferring the Bill is under the same obligation as if he had endorsed it.

J.C. Rep. 64
6 J. Rep: 52-
2 Raym: 928
12 Mod 244
268-521-

Lex Vide Holt 246. 9. Salk 124-3 Salk 68-

Not Law now. - - -

J.C. R. 65.6
Bull 121-
Chitty: 324-

This rule does not obtain if the parties at the time agree that the assignee shall take the Bill as paid and himself assume the risk

J.C. R. 65.6
3 J. Rep 177
2 Raym 928
Hyett 301-

If then a Bill is transferred by bare delivery and such agreement is not made, the assignee may recover of assignor on the consideration if the transfer i.e. may bring an action for the goods sold. or for the antecedent debt. But he cannot recover on the Bill. as assignor because he is not a party to it for his name is not on it.

2 Raym 928
Carth: 270-
3 Burr: 1523
1 Shower 130-
Esp big: 61-

And for the last reason. the assignor cannot be subjected to a subsequent assignee. he is liable only to his immediate assignee.

Chitty: 128-

So. a purchaser there is another exception to the general rule - and that is - if the transfer is upon a discount - i.e. by way of a sale - the party transferring is not liable - The true reason is that there is no distinct promise of claim - there is no indebtedness - antecedent or remote - to the transfer - It is like the sale of any other article -

3 D. Rep. 757
1 Bos. Rep. 447
Ken 90.1

Where there are several parties liable upon a Bill - the holder may take his remedy - against any one - or all of them seperately - but not jointly - and if the holder pursues one to judgt. and takes him in execution this does not discharge the others - nor if the holder discharges him from prison will it discharge the others - and if he becomes bankrupt the benefit of insolvent laws, the others are still liable -

2 Ble Rep 1235 -
4 D Rep 185 -
628 -
13 Ken 190
1 Salk 574

If the holder of a Bill transferable by delivery loses it and it comes to the hands of a bona fide holder - he may recover against the prior parties - the former however could not recover - The rule is the same if a Bill is stolen and transferred to a bona fide holder -

1 Burr 452 -
3 Burr 1516 -
1 D Rep 738
Salk 126
7 D. Rep. 427
3 Salk 71

But if the holder in the case supposed - receives the Bill after it is due - he is liable to the presumption of knowledge of the unfair transfer and according to some decisions he is liable to the same equity as the holder or thief was -

Lex Mercatoria Bills of Exchange -

L. R. Ref. 285 - 1 Do: 607 -

And if in either of these cases the holder has not given a good consideration for the Bill and the drawer having no notice of the loss may sue the holder in his name and shall not be compelled to pay again -

1 Doct. Ref. 40 - 151 - 6 Bulley 125 - 150 - 151 -

But if a lost Bill is paid to the holder in due course of business at or before the day of the time of the drawer shall pay it over to the loser -

The case is exactly the same if the drawer pays the Bill before it is due -

1 R. Ref. 607 1 J. Ref. 28 Doug 617 or 637 - new Edit.

If a Bill transferable by indorsement only if the holder gains possession of it by a forged indorsement cannot recover for he who takes it must run the risk of the indorsement being genuine - If then one claiming under a forged indorsement receives the money of the acceptor while the true owner might recover the amount over again -

Beaves Ple 188 B. & R. 271

It is a rule of public law that if the drawer of a foreign Bill accepted or not is liable to give notice to any person by him - he must give notice to the holder and at the same time make the Bill - if he refuses a protest may be made and after time of pay has elapsed he is liable to an action -

Lex Mercatoria Bills of exchange

Chitty 127.8

There is no such rule as to Inland Bills - - -

If the drawee absconds after acceptance the holder may protest the Bill for better security & Beawes Pl 22 ed 24-to 29-
even then he must give notice to the parties [illegible] to the drawers absconding - to secure her claim against them. Statute of limitations only after acceptance -

This letter security when given is to be given by a third person who engages under [illegible] to be bound as principal for the payt. Com dig Merchant B. 8- Chitty 129

Presentment for payment -

The general rule is that the holder must present the Bill to the drawee for payt at the time when it is payable when that is expressed in the Bill - and if not in a reasonable time - Anon & Wilk remark that if the Bill has not been accepted it must still be presented for payt - And if the holder does not present for payt as the rule requires he loses all remedy vs drawer and Indorser -

2 Burr 669. 7 D. Rep: 541 Hy Bl: 120, to 5 Selk 127 Str 1268 2 D. Com L 70 1 Show: 15 B. & P 182 & et ante

If the acceptor is dead presentment must be made to his personal Rep[resentative] if he has none it is to be made at the house of his last abode

Peth R: 146 Chitty 132. 6

But a neglect to present for payt may be excused for the same causes as ~~as~~ neglect of prest for acceptance quas vide ante -

Doug 1 235 or 247 - 1 East Rep 66 - The acceptor himself can never defend upon the ground of delay in presenting for payt but the prior parties may - nor can he defend on the ground of indulgence to a prior party - for he is the first party liable -

10 Mod 38 - Bailey 108 - Contra 1 Stra 222 ay Poth 140 1 Salk 93 - It has been said that an action will lie by the holder as acceptor without any presentment for payt - for that he is liable to pay - first - and that it is his duty to look after the holder But on principle I think this not questionable for it would subject him to travel from Dan to Beersheba to look for Tom Stokes the holder - and thus operate as a hardship. By the Clearing indeed he would be bound to look after the holder but not in these cases -

Poth 174 Chitty 133 - In the case of foreign Bills of the course of exchange alters between the drawing and the payment time of a Bill the acceptor is to pay - at the rate of exchange when the Bill falls due -

2 Show 235 - Ch Ch 134 - When however the acceptance is to pay on or after demand the clearly may insist on want of prest for payt as a defence - there can be no recovery to him -

Lex Mercatoria 1 Bills of exchange -

If the acceptor appoints the Banker of a person as by his Banker - the acceptor and any prior party may insist prima facie on the want of presentt for payt at that place - If however it can be proved that the Banker had no effects the holder is excused - 2 Str. 1195 - 2 Th. Bl. 509 -

This presentment for payt is to be made by the holder or his agent. Mr Chitty adds "the agent must be competent to give a legal discharge of the bill - This I think is not law - Because the acceptor cannot by law demand a discharge by tendering the money - and refusing otherwise to pay it - See Chitty 157 - Beak 179. 180 - 12 Mod 242 - 1 Esp. Rep. 165 - 7 Mod. Rep. 167 - 10 Mod 286 Chitty 134

Also the presentt must generally be made to the drawee in person - but this is not universally true - for if the acceptor is not at home - it is sufficient to present at his house or place of business - and if place of presentt is designated it must be there - and is good whether he is there or not - 1 Com. Dig. Merch. F. 7 - 2 Th. Bl. 509 12 Mod 241 1 or 2 Esp. Rep 4 1 Esp. 512

It is said that if the place appointed for payt is the holders own house or election of his Books is enough - But this formality I think is unnecessary - It is only said however to be sufficient but not that is necessary - 2 Th. Bl. 509

If the acceptor has removed from one place to another the holder is to enquire where the acceptor has removed and present at that - But if the acceptor has absconded - presentt is not necessary and if he is out of the realm presentt at his last place of abode suffices - Str. 1087 - 2 Mod. Rep. 234 1 Esp. Rep. 511 - 4 Mod. 125. 7 -

Lex Mercatoria. Bills of exchange.

March 19th

Clutt. 136. 7 146 -

The time of usual for payment where the Bill is payable at a certain time after ~~usual~~ sight or at usance ~~or at the Bill~~ must depend on the time expressed in the Bill. But where it is not expressed in the Bill the time of usual for payt must depend on the circumstances of the case - and is to be made in a reasonable time.

L. J. Ref 170 Both Ple 12. 198. 172 - Beames: 256 1 Shower 163. Kyd 10 - 1 Bard: 303 2 Bohn Ca: 328 2 Caines 343 2 Cain Ca: 195 4 Dale: 147

But where a time of payt is expressed the Bill is not payable at ~~that time~~ for days of grace are ~~not~~ allowed. Where the Bill is payable on sight or demand the days of grace accordg to some opinions are not to be allowed but according to others they are - and this is the better opinion and so - say the American authorities generally -

Beames Ple 281 Bothier: 155 Bailey: 68 Clutt. 59 - 60: 64. 83 -

If a Bill is drawn at a place using one chronological time and payable on a day certain at a place using another the time is to be determined by the ~~last~~ side of the place - See Vide Contra Kyd & not law -

L. Ray 280 Beames: Ple 282 Bothier: Ple 13-15 - 5 T. Rep: 212 - Fortescue 376 - not law -

If a Bill is drawn payable at a certain ~~time after sight~~ date or usance the day of the date and the day of payt are not included in the computation. This rule of the law merchant differs from the Com law rule - Vide 2 Vents 308. 10 Cowper 714 - 3 T. Rep. 623 - Bowen Powers: 648 -

L. Ray 1076 4 T. Rep. 337 Com. Dig: Fait. B: 3 - Bac. Abr. Leases. L. 1 -

If a Bill payable at a time certain after date and has no date the time is computed from the day it issued. But the day is not included -

Lex Mercatoria Bills of exchange

Days of grace are so called because the indulgence was originally gratuitous on the part of the holder - But it has now ripened into a right -

2 J. Rep. 152. 1 Kyd. 9, 10. 121. 5 to 1 Esp. Rep. 59-261

The number of the days of grace is different in different places. and the lex loci governs - Here and in Engd it is three days - time -

Chitty 130 Beames Pla. 260 Kyd. 9, 10.

The Bill is to be presented on the last day of grace - And in England and in this Country Sundays and holydays are excluded - i.e. they are counted.

Chitty 140-143 - Sunday Potter 139 -

If then the last day of grace happens on Sunday. Demand of payt should be made on the second - and if Bill is not then paid. it is dishonoured - and the holder is entitled only to two days -

2 Kyd 74 3. Stark 629 - Kyd. 120.

But where the days of grace are all days of business prest before the last day is a mere nullity -

1 Esp. Rep. 261

In the law Merchant the word usance is is used to import the usual or customary time appointed for payt as between countries between which Bills are drawn - & so foreign Bills - are usually drawn in this manner - The length of this usance is different in different countries.

Kyd 4 -

If a Bill is drawn at a Month or Months after sight or date the computation is by Calendar months. & not lunar months. Lecus. the Com law rule. 2 B. Com: 141 - 6 T. Rep: 224 - 2 East: 333 b. law rule

Beames Pla. 253 Kyd. 6 - Chitty 143 -

Ley of Merchants. Bills of exchange

Comb. of Merch. 7 Ed. Rep. 212

If a Bill is payable at a fixed period after sight the time is to be computed from acceptance or protest for acceptance.

Abra. Lit. 508 1175. 1248. Ld Raym 925 1 T. Rep. 166 2 H. Blac. 565.

Where no certain time of payment is expressed in the Bill or acceptance, protest for payment must be made in a reasonable time.

Ld Raym 725 Chitty 69. 148 Bayley 69. 67

The day of protest being ascertained or ascertained protest must be made in a reasonable time before the expiration of day - and in the usual hours of business.

Abra Lit. 910

On protest for payment the Bill should not be left with the drawer unless it is paid and if it is so left - protest is not considered as made till the money is demanded -

Poth: Pla 164 Chitt. 149 -

Payment should generally be made only by the order of the Bill or his agent - and payment generally only to the owner or his agent. - If therefore the Bill is paid to the payee after negociation of the Bill he is liable to pay it over again to the owner -

2 Vent: 310 Carth: 5 - Ld Raym 107. 8.

If a Bill is payable to A or order for the use of B - payment should be made to the trustee or his order and not to B or his order -

1 Mole Rep. 189 - 1 Saund. 290 - 4 T. Rep. 273 -

But tho protest for payment is to be made with in the usual hours of business, yet it is a general rule that when money is payable on a day certain, the party has to the last moment of the day to pay it in -

Lex Mercatoria. Bills of exchange.

But this rule does not extend to foreign Bills and the reason is that protest must be made on the day on which the Money should be paid - Dayt there must be made within the usual hours of business in order that there may be time for protest. Kyd. 121- L.M. Reft. 174-

In inland Bills as there is no protest necessary the rule above laid down obtains - Bayley 67- Both. 140- L.M. Reft. 170

If a Bill is drawn here payable in a foreign Country and in foreign Coin. the value of which is after words varied. the Bill is to be paid according to the value of the Coin at the time it was drawn - Skinner 272 Chitty 154

If the holder compounds with the acceptor without the assent of the other parties they are discharged - for he discharges the acceptor of his liability to them - Chitty 155 183- Cook Bank 160-

But secus - if the holder only receives a dividend from the acceptor he being a Bankrupt - because he can recover no more. and is advantageous to the other parties - Chitty 155

It has been held that if the holder receives a less sum from the acceptor than is due - tho he receives it only in part satisfaction if he does it without the assent of the parties they are discharged - for they say he has made his election - L.M. Reg. 744 Stair 745- B.C.A.B. 273-

This rule does not seem to be law and there are respectable opinions against it. This is certainly B.C.A.B. 271- B. 275- Chitty 156 160

Good B Law 69

for the advantage of the parties for Lord Ellenborough gives notice - they are benefitted in all common presumption.

4 Ray 742
Peake 179-180
Peake Ne. 78. 240
2 H. Bla: 31
1 Vin. Ab. 192
Fortescue - differs from Holt

It is held by Chitty to be doubtful whether a party bound can start upon a Receipt as a Condition of Payt - The better opinion is that he cannot - and it is certainly opposed to the Com Law rule -

Peake Ref. 25
Chitty 157. 8
209 -

An general receipt indorsed on the Bill not naming the part, from whom the money is received is prima facie a payt by the Acceptor for he is the person first liable - If part is made by drawer or Indorser receipt should be given in their names -

Chitty 156. 202

If Payt is refused the holder must protest the Bill if foreign and whether foreign or inland must give notice of non payt to all parties else they ought not be liable - The notice is the same as the notice of non acceptance mutatis mutandis - Form of protest Chitty 159 - 8 Form of protest No 3

If a part only is paid the Bill if a foreign one must be protested for the residue and whether foreign or inland notice is in all cases to be given of the fact - except where it is waived or excused -

4 Ray 910
2 B. C. 269 -

In certain cases under the Stat 8 & 9 Wm 3d inland Bills may be protested for non payt, but this merely for the purpose of enabling the party to recover interest and damages as the foreign Bill -

Lex Mercatoria. Bills of exchange -

The only effect of these Bills are to give the holder a cumulative remedy -

Protest for the non payt of a foreign Bill should be made on the day of refusal and notice should be sent by the first mail or any necessary mode of conveyance - L.J. Keb. 174 L.J. Lloyd 748 Str. 829 2 W. Bla. 685

In the case of inland it seems that notice need not be given till the day following the day of refusal - and the reason is that the acceptor has the whole day to pay the Bill in. - Notice however should be given on the day following if by post otherwise the prior parties are discharged - 1 T. Keb. 168. 9 - 1 T. Keb. 107 1 T. Keb. 168. 9 - Bac. 515 2 W. Bla 565

When a Bill foreign or inland is dishonored part may be made by a third person for the honour of the drawer or any Pr. Acceptor - sub protest Beawes Pla 50 Chitty 108. 15

But if the drawer has once accepted according to the tenor he cannot lay before protest for the honour of any Pr. Acceptor - for he is bound by his prior acceptance as to him - Beawes Pla 51 Chitty 163 -

But if the acceptor has no effects of the drawer - he may lay a protest for the honour of the drawer - and then he has a remedy on the Bill vs the drawer. - Mr Chitty says the effect is to give the acceptor a remedy vs drawer. But this is wrong - for he has a remedy before but in a different. But this gives him a remedy on the Bills. 1 Esp. Keb 113 - Chitty 163. 4 1 Bro. C. 139 - 1 T. Keb. 269 - Beawes 546

Lex Mercatoria. Bills of exchange—

The rule given in the Books is that he may pay supra protest only when he has not effects of the drawer in his hands. But he may do the act tho he has effects but he would not acquire the same rights—

Beames: Co 53. Chitty 105 163— Generally payt should not be made for the honour of a party till after protest for non payt—

The reason is that without a protest the party paying acquires no right to recover on the Bills upon any of the prior parties—

Kyd 156. 153. Chitty 163. 191- 202- 205— The undoubtedly if the drawee having no effects of the drawer pays for the drawer without a protest—he may recover as for money laid out & for his—but not as party to the Bill—

+he had Quia Trust that a tho a person who has before paid without a protest for the honour of a party may recover as for money paid laid out vs the party—if he has before accepted supra protest—but he cannot recover on the Bill—

Chitty, 164 As a stranger may accept supra protest he may pay supra protest for the honour of the drawer or an Indorser and he has his remedy vs the party for whose honour he pays and all prior parties—m.....

March 20th

Promissory Notes.

2 B. & A. 467 Kyd 35. 18 Chitty 163 A promissory negotiable note is a direct engagement or agreement to pay a sum of money to a person named contemplating operative words of transfer.

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A prom: note is somewhat in the nature of a Bill of Exchange drawn by the Maker on himself - A prom: note is holden not to be negotiable at Com. law tho' it contains operative words of transfer - and indeed at Com law it is mere evidence of a parol promise and not an instrument on which an action can be founded - 1 Ld Ray: 576 - Salk: 129. - 2 Ray: 757. 759. - 3 Burr: 1520. - 4 T. Rep: 151.

But Notes made payable to order or bearer were put on the same footing with inland Bills of Exchange by Stat 4 & 5 Ann. and which was made perpetual by Stat 7th Ann. and of course actions can now be maintained on them as on Bills - and the rules relating to such inland Bills are generally applicable to prom: notes. 1 Ld Ray: 574. - Chitty, 167. 9.

It is now settled tho' formerly holden otherwise that days of grace are to be allowed on prom: notes as on Bills - 4 T. Rep: 152 - 8 Ct. 8: 274 - Doug: 61. 63. - 7 T. Rep: 147 - Chitty: 169.

A prom: note when indorsed bears a very strict analogy to a Bill of exchange - This analogy has been pointed out ante - 1 Burr 676

Banker Cash notes are prom: notes given by Bankers - Nor were these determined to be negotiable till after Stat Ann - Hist: 4/5. 550 - Holt: 199. - Salk: 283. - 3 Lev: 299. - 12 Mod: 180. - 6 Mod: 29. 30 -

Banker Cash Notes payable on demand are considered as Cash and treated as such - 12 Ray: 744 - Doug: 633 - 7 T. Rep: 423 - 3 Burr: 1517 - 1519 -

Lex Mercatoria Bills of exchange -

2d Raym 743 -
1 Salk: 132.3.
4 T. Rep: 149 - These Bankers notes if they are endorsed may be declared upon like Bills of exchange -

Bank notes are nothing more or less than promy negotiable notes. They owe their origin to the Statute creating the Corporations. They are a circulating medium - and a mutch pass as money in a Bill. -

1 Burr 457 -
3 T. Rep: 554 -
6 T. Rep: 335 -

These Bankes notes are payable generally - on demand -

2 Bla Rep. 828 -
Cowp 197 -
1 H. Bla 239 -
2 Bla Rep 1269
5 Burr 2589 -
3 East 164 -

But they are considered as money and action for money had and received - as the finder will not be liable unless he has actually received the money for them for this action lies only for money in reality -

3 T. Rep 554
1 Eq Ca Abr 3 18 -
Doug 662
2 Bos & Pull 528 -

They are not a Corporal tender provided the Creditor objects to them at the time because they are Bank notes, and not money -

No particular form of words is necessary

8 Mod 362 -
Stra 629 -
786 -
2d Raym 1396
1 Salk 32 -

to create a promy note - But any writing containing an express promise to pay money - and containing words of transfer - is a promy negotiable note - Thus a promise to account with A for a certain sum for value received, is a promy note -

1 Bos Rep. 426 -

But the mere acknowledgment of a debt without words of promise will not amount to a

Lex Mercatoria

Bills of exchange

from y note. Thus the Memorandum I. O. U. -
is not a promy note, but is evidence of indebtedness -

A promy note must have the same requisites as a Bill of Exchange - (see vide ante - Str. 1151-1271- 1 Burr 323- 5 T. Rep 486 4 D. Rep 149- 1 Do: 243-733- 4 Mod: 242- 78 Rep. 243

If an instrument does contain ~~have~~ requisites & promise to pay, wants there requisites it is only evidence of a past promise but may be declared upon between the original parties as a Bill of Exchange -

The action here and in Engd is to be brot in six years - But the Stat of Count provides that the time in which the Maker is out of the State is not to be computed -

The Remedies on a Bill or a Note -

The usual action on a Bill or note Chitty 179
is assp. and this is held to be the only remedy
when there is no privity between the parties to
the suit -

The holder may maintain this action 4 T. Rep. 471-
agt all the prior parties severally but not
jointly - for each of them makes a distinct Con-
tract - Thus the action lies for prior as Acceptor
or Drawer: & lies for the assp by delivery vs them
all. Acceptor Indorser and Drawer -

But the assp can not maintain an

action against any person whose name is not on the Bill except him from whom he received - never been not on the Bill but on the Consideration of the transaction for the debt for which he received the Bill &c -

Stra: 515: 16- 7 T Rep 64 2 D Rep 928 12 Mod 244- 1 Ld Ray 582-

The action may be maintained by the drawer vs the acceptor because on him is the primary liability - Chitty says the drawer may maintain an action vs the drawee for a refusal to accept - This certainly not law -

Chitty: 180-

And in general any party having been compelled to pay the Bill may have their action - their action vs any prior party - This rule presupposes the Acpt's name is not on the Bill -

7 T. Rep 591 Chitty 180

If the acceptor accepts for the accommodation of the drawer - which supposes he has no effects of the drawer - he may have action vs the drawer but not on the Bill -

1 Ld Ray: 156-196- 12 T. Rep: 169-

The action will also lie for a stranger who has paid before protest vs the party for whose honour he paid and vs all the prior parties He may maintain an action on the Bill -

1 Ld Ray 196 - Chitty 180

It is a general rule that an action will not lie in favour of a person who became a party after the holder -

4 T. Rep 470

Lex Mercatoria — Bills of exchange —

But this rule cannot hold in favour of the acceptor or drawer or any of the prior parties —

The action will not lie vs the party from whom the holder immediately received the Bill unless he ~~procured~~ paid a value be considération. This is the English Rule — But this position has been shaken by some N. York decisions —

Hyd 135 — 7 JR 121. 571 — 350 — 1 Bos & Pull. 651 — Doug: 514 — 1 Nelson: 185 — 2 B. Com: 446. Contra

If the holder makes the acceptor his Executor or dies the right of action vs all the parties is extinguished. The reason of this rule is that the primary obligation being discharged the secondary is of course — Besides the transaction destroys the claim of the other parties on the Acceptor. — In Equity he may be considered as a Trustee for those who have the beneficial interest —

Bowden 184 — 543 — Salk 299. — 2 B. C. 511. 12 — 3 Doc 18 — Pothi 171 Re.

If the holder at the same time commences an action vs each of the parties but he can have but one satisfaction — the others are discharged except for the amount of the costs in such case —

1 Nelson 46 — 3 Mod 66 — 2 Show 494 — 4 J. Rep. 691 — Chitty: 181. 2 — 193 —

If then the action vs Drawer or Indorser the Dft pays the amount of the Bill and the costs of the parties in an action the Ct will stay the proceedings —

4 J. Rep 691 — Strat 515 — Chitty: 193 —

See Bla Rep 749 — where the doctrine is controverted, but not law —

Lex Mercatoria — Bills of exchange

If however an action is brot by the acceptor and the others parties also the proceedings as him will not be stayed - unless besides the amount of the Bill he pays the costs of all the actions. Because but for his default the other actions would not have been had - And Mr G does not see why the same rule should not obtain in relation to parties who accept subsequent to the drawer or Indorser. But the distinction seems not to extend to such cases -

Ld A defers

Stra: 615 -

But the holder may have actions versus all - and have the persons of all - he can have but one peri passis - i.e. but one satisfaction -

And if after he has obtained satisfaction as one he should happen to take execution out as any other suit - he may be relieved by Audita Querela -

Burr: 323 - 2611 - Comyns: 632. Hyde: 566 - 177 - 197 - 37 Rep: 1741 - 3 Burr: 1516 -

The Action may be founded either on the Bill or note or on the consideration of it -

If he sues on the consideration he declares on the Common Counts as for goods sold & money had & - and the Counts are inserted most usually by Attorneys ex abundanti cautela - in order that if he may recover on some one of the Counts at least - Vide for forms of declaring on Bills - Chitty 233. to 248

Selle: 24 - 3 T. Rep: 174 Hyde: 197 - Chitty: 154

Lex Mercatoria. Bills of exchange -

It was formerly usual to allege in the Declaration the custom of Merchants in Bills of Exchange. This has long gone into disuse - and the custom need not be even referred to. Lillay: 21. 886. 175. 1942. Carth: 83. 267. 270. 3 Mod 226. Ld: 177. 1798.

In declaring upon a promissory note it is usual in Eng for the plff to aver that the deft became liable by virtue of that Statute. Mr Lee could cannot for his soul see the necessity of this the Statute is a public one and of course need not be pleaded Chitty, 185-246-

In a Count on the Instrument itself it is not necessary to allege a consideration for the law implies one. 1 Bla Rep 487. 2 Ld Ray 758 Ld: 446. 2 B. & C. 445.

Nor is it necessary to make a present of a Note or Bill - for it is not a Specialty. 1 Alden: 386 4 T. Rep 338 Bunbury 242

When a Bill or note cannot take effect according to its form the better and more proper way of declaring upon it is to state it according to its legal effects. Thus on a Bill payable to fictitious payee - it is proper to declare upon it as payable to Bearer - March 20th Afternoon — 3 B. & P: 176 2 B2-480. 643. 1 Bla: 313. 569-280: 194 20 E. Chitty 4 & 5 & 6. 186. 186 -

And when a note is payable to the order of A - he may declare upon it as payable to himself 2 Shower 6 Carth: 403 -

In action on Bills of exchange it is usual and not necessary to allege a promise to pay. It is enough to describe the Bill to show how it and by it became payable to A and then by facts to show Carth 509 Salk 129 Ld Ray 538 Ld: 196 - Chitty: 146 / 736 -

the bills habitually - It is not necessary expressly to insert the promise in the Declr because the law does that -

1 Wils Rep 313. 6 Mod Rep 659 — And wherever the party sued on the Bill became party by procuration it is usual to state it but it is not necessary -

4 T. Rep 149 6 Rep 743 1 Burr. 674 — The Indorsee may declare as his immediate Indorsee on a Bill of a draft by the Drawer and payable to himself because an indorsement is equivalent to a new drawing of a Bill And Mr G trusts that a subsequent holder may declare in the same way. If the Indorsement is in blank because he may fill up the blank in his own name -

This is however not the usual form. for when an Indorsee is sued, he is sued as such - this is the safer way at any rate -

Com 658 leading case Rushton vs Aspinall - 2 Burr 1270 1 T. Rep. 712 - 1 Ventris 45 Chitty 188, 9-202. — In action as Drawer or Indorser the Pltff must in general allege a grant for payt and as the case may be grant for acceptance, i.e if grant for acceptance was necessary. — But he must allege grant for payt - and that the Acc. refused or neglected to pay. and that the Pltff has given Dft regular notice -

Show 325 1 Wils Rep 602 9 Esp Rep 126 — Upon the Common Counts Observe. the instrument itself may be in some cases introduced as evidence of indebtedness - and then it is more

Lex Mercatoria Bills of exchange

evidence. for it is liable to be rebutted by offering any evidence from left-

On some cases indeed the holder of a Bill sues on the Com. Counts only - but this seldom takes place unless the Instrument is itself defective - but even then it may furnish evidence of indebted resp-

3 T. Rep. 174
2 Shower: 501.

On the Com. Counts the pltff may go into evidence of the consideration and then prove his Contract by hand - for the Bill does merge the original promise - as in case of a Bond - which merges the original consideration -

3 T. Rep. 174
T. T. Rep: 241
1 Esp. Rep: 245
1 East: 58.
Bl. R. 187.
Stra: 719.

On action by payee vs drawer of a Bill. or maker of a note. the instrument may be introduced as evidence of money lent. and is prima facie evidence of that fact. He may recall any notice of the Bill on his name evidence as evidence to support his money Counts.

Stra: 725
2 Raym: 758
12 Mod: 380.
3 Burr: 1516.
1625.
6 T. Rep: 123.

The rule is the same in an action by Endorsee vs his immediate Endorser - the indorsement may be introduced as prima facie evidence of money lent.

1 Burr: 373.
Chitty: 190

And it is said that a Bill or note is prima facie evidence also of money paid by the holder to use of the drawer or maker - This has never been decided - but is very reasonable. This however may be questionable for want of privity between the parties -

Bailey 95
Chitty 191

Lex Mercatoria. Bills of exchange.

1 W. Bla: 602 - Bayley: 95 - Chitty, 191 -

It is also ~~that~~ held that a Bill accepted is evidence of money paid by the holder to the use of the acceptor

This doctrine is however denied by Lord C. B. Pigott. This rule seems questionable -

1 W. Bla 239 Bayley 96 Chitty, 191

The Bill is held to be prima facie evidence of money had and received by the acceptor to the use of the holder. There has not been decided but I am inclined to think it is correct. The evidence is that the holder might sue the acceptor in ~~an~~ debt assumpsit for money had and received and give the Bill in evidence.

17. Ves: 269 - 7 Do: 576 - 1 Esp. Nisi: 282

If the drawer not having effects of the drawer pays the Bill, the Bill is evidence of money had and received to ~~the~~ extended for the use of the drawer. But the rule requires that the drawer should have had no effects of the drawer in his hands. This is plain enough -

2 Salk 283 - Vern & Br: 80 - 8 A: B: 36 - Burr: 1516 -

A Bill or note is also prima facie evidence of money had and received by the drawer or payee to the use of the holder. The drawer is supposed to have received the amount ~~the~~ payee transfers it - and the holder is supposed to have paid for it. and the drawer -

1 W. Bla 239 Chitty: 191.2

It has also been determined that an acceptance is prima facie evidence of an account stated between the acceptor and holder: of course evidence of the balance due to the holder from the acceptor - evidence in ensuing continuance

Lex Mercatoria Bills of exchange —

Rules regarding the Evidence —

The evidence in them as in all other is governed by the pleadings. that which it is necessary for the holder to allege in his Declaration it is necessary for him to prove.

It may be observed that the holder who sues must prove that the Bill was made or that one which on its legal operation is the same that he describes He must prove that left he came in part by Act —

When the holder sues the acceptor he must prove that the Acceptance and acceptt. and if it was by agent accepted he must prove the agent was lawfully authorised to make it —

If the acceptance was conditional the holder must show that the condition on which it was to be held has been performed.

In action vs acceptor proof of his conspicion that he accepted is sufficient — but then will no evidence in an action vs any of the other parties.

This rule is a general rule as applied to all the parties —

In an action vs Drawer or Endorser. the letter having pending or that of his authorised agent must be proved

In an action vs party who transferred the Bill by mere delivery the holder must prove that left did deliver the

6 Mod: 600
Doug 667.
3 T. Rep: 178-
335-643.
4 T. Rep: 470. 611-
1 B & Pullen 7-

1 Esp. Rep. 15.
Chitty 24. 200.7

Stra 212
Comp 571-

1 Esp. Rep. 15-
Stra: 646-
1051 - 12 Mod 309.
1 Esp. Rep. 143-
B. & P. 136.
Peak Rep: 16-

B. Ray 1376-
1542 - Stra 399-
609 - 8 Mod: 307-

3 D. Rep. 64-
Doug: 925-
6 T. Rep: 52-
12 Mod: 244
406 - 521

Lex Mercatoria - Bills of exchange

Bill to Indorsement. Thus in general the production of the Bill is sufficient unless the contrary be proved -

Bayley 116 Chitty 4. 51- 124-201-

And when the holder received the Bill under suspicious circumstances it may be necessary for him to prove that he or some intervening holder received it bona fide & for a valuable consideration - Eg in Bill lost for example -

Peake R: 20-225 1 Esp. Rep: 180- 11. Rep: 654 Doug: 630- 653- 37. Rep. 175-

If an action is brought by Indorsee vs Drawer or Acceptor he must prove the hand writing of the first Indorser: else he has not made out his title -

Mood. 37

When there have been two indorsements - the first being in full - the holder must prove the hand of the first Indorsee as well as of the first Indorser - and that he must do whether he brings the action vs first Indorser or Secondary or Acceptor or Drawer -

176. Bla: 606- 7. Mod 87

The reason of this rule will be obvious from the nature of the Bill - the first Indorsee must be shown to prove that he had a right to indorse over so must the second in order that he may make out his title -

Doug: 617- Newsted: 633 Both: 296 Peake Rep: 225 1 Esp: Rep: 180-

But if the first indorsement is in blank - it is not necessary to prove any subsequent indorsement vs Acceptor or Drawer or the action because he may fill up the Indorsement in his own name - and the same holds as if he brings an

Lex Mercatoria Bills of exchange -

action vs Drawer or Acceptor

If Bill is payable to fictitious payee or order - it is not necessary to prove indorsement - such Bill will operate as a Bill payable to Bearer - unless such is to be declared upon -

8 D. Rep: 174 - 182 - 481. 1 Wh. Bla: 313. 3 Mc. 369. 2 Vs: 194. 245. Kyd: 206 -

When Drawer or Indorser is sued Plff must prove that he used due diligence to obtain the money from the Acceptor or Drawee. Bill then employed ceases. It is not broken with the holder unless he has used due diligence -

Com Rep 579 5 Burr 2690 1 Vent 45 1 D. Rep 912

And this due diligence consists of three things first for Acceptance - next for payt - and notice - if the Bill is dishonoured - within the time prescribed by law - It follows then that Plff must prove in action vs Drawer or Indorser first for Acceptance -

Kyd 117 1 Wh. Bla 563

And it follows that he must prove first for payt - and then even that the Drawee has refused to accept -

2 B. C: 470 - 7 D. Rep 561 2 Burr 669 - Salk: 127 - Str: 1094

And in both cases - if the Bill has been dishonoured - the holder must prove notice of that fact to the Deft - and that he has given notice in reasonable time -

5 Burr 2670 12 Rep 708 1 Vents: 46 -

And in case of foreign Bills - the Plff in proving notice to Deft must prove a protest because in case of foreign Bills a protest is a necessary part of the notice - and then for non acceptance & non payt -

2 Kyd: 99 6 Mod: 8 - 2 T. Rep: 713. 5 T. Rep: 239 1 Salk: 131

Lex Mercatoria Bills of exchange

Buller: 270
12 Mod: 345
Holt: 297
Peak Ev: 74

But nothing more is necessary than to produce the protest for it proves itself but if a forgery - the other party may prove it so -

These proceedings on the part of the holder are excused in certain cases - which have been already mentioned. Vide the rules supra - And when notice &c is not necessary it need not be proved -

Doug: 131. 133.
2 Keny: 443-
2 Ld Raym: 1544-
Stra: 441-
Com Rep: 579
2 Burr: 669-
1 Bos & Pul: 334
note: Say: Ed:

It was formerly holden that on an action as Drawer it must be proved by plff that he made demand on Drawer but not Indorser - But it is necessary to make demand on Drawer - But as to Drawer and Indorser - there is absolutely as to Holder - is coordinate - and for Indorsee he is not obliged to go to the Drawer first -

2 Ld Raym 742. 3 -

If an Indorser having paid the Bill sues the Drawer & receives or from Indorsee he must prove that the Bill was returned to him - and that he had it - else he has no right to recover -

The rule is the same as to Drawer when he sues the receiver - If he had it voluntarily he has perhaps unnecessarily interfered with the duties of the receiver

3 Keb: 818.
Ld Raym 156
Chitty, 203.

If the receiver sues the Drawer - he must not only procure the Drawers hand writing - and prove by himself or some thing equivalent to

Lex Mercatoria - Bills of Exchange -

Payt ers that he has been taken in execution
but that he had no effects of the Drawer in his hands.

Contra. if the Drawer sues the Acceptor 10 Mod 66, 7
he must prove an acceptance. A demand of Payt 1 Wilson 168
and refusal - and that Bill has been returned
to him and that he has had it -

But in action brot by Drawer vs Acceptor 1 D. Rep 406
for it is not necessary for Plff to prove that he had 409.
effects in the Acceptors hands. The presumption 3 Do 182.
is that he had and the onus probandi lies on 2 Vb. Bla 612
the Deft -

In the Case of Walton and Shelly it was de- 1 D. Rep: 300.
termined by K. Bench that any party whose name 3 Do: 36 -
is on the Bill cannot be introduced to impeach 7 Do: 332 -
it - C. J. however thinks otherwise. Drawer Peake Rep
introduces Payment - to prove that it was usu- 5. 62. 224,
rious. It has never been decided in Court - 4.0
1 Esp Rep, 10 -
85. 298 -
1 Bay: 17. 301 -
1 Caines: 258
267 -

But however that may be settled - Peake 6. 82 -
it is established that in action by Indorsee of a 117 -
note vs Maker. Indorser may be admitted to -
prove Payt. thus does not impeach the note -

So also in action vs Drawer of a Bill 1 Esp Rep 332
the acceptor is good Witness to prove that he
had no effects of the Drawer and that that
notice was not necessary -

2 Ray 731-
1 Atk: 446-
1 Esp. Rep: 50-
Peake: 165-

In action on Bills bill of must generally prove the Bill itself - tho' it be lost even then can be proved by mere production & sworn Copy of it or parol evidence of its Contents.

Ld Raym 442-
648- 944
3 Burr 1354
1 Bla Rep. 390
2 Ray: 444
Salk: 127.
7 T. Rep.: 604
612-

In action vs the acceptor of he accepted after the Bill was drawn - and had seen it - the production of the Bill is sufficient evidence without proving the hand writing of the drawer

Often the Bill was really a forgery - and the drawer having seen it accepted it - the forgery is no defence in favour acceptor vs a bona fide holder - because he is not bellied along the deception -

vt supra

But this rule does not hold if the drawer accepts without having seen the Bill - because here no act of his shall be construed to help along the deception -

vt supra -

The same distinctions hold in actions vs Indorser -

5 Burr: 2639
2 T. Rep 275-
1 Esp. Rep: 347.
1 T. Rep 464 -
2 Bla 374

When a Left and upon a Bill brings money into Ct - he admits his own signature - i.e. his liability to that amount - one of course can make no defence inconsistent with his admission -

Chitty 209

When a holder sues on a Bill he supposes bill by mere delivery - the production of the Bill is in general sufficient evidence of his title - There is an exception to this rule where

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Bills of exchange

be considered under such circumstances

Thus when Bill is payable to Bearer Chitty 209.
it is not necessary for holder to prove that person
endorsed it to him - or mere possession is prima -
facie evidence of his right -

If an acceptor having had a Bill duly
protest - does the Drawer for the money - the
protest is prima evidence that he had no
effects of the drawer - Chitty 163. 209, 10 -

Protest is sufficient evidence of presentment and refusal - Beawes pl 220
as Bearer or Endorser. B. & P. 270 -
and that protest in foreign country - L.T. Rep 175 -
is peculiarly fit for the purpose for which Skinner 272.
it was intended - &c. The production of the B. & P. 270. -
protest does not however dispense with the pro-
duction of the Bill itself -

That a letter containing information - 2 H. Blc: 509.
of the Bills being dishonored was put in post Both: pla 148.
office or left at Bills house is sufficient evidence 1 Esh Rep: 5 -
of notice - ~~has evidence however to be left~~ Peak Rep 165
~~must be~~. So let in this evidence however notice must be Peak Ev: 107 -
given to left to produce the letter -

Debt -

This action will in some cases
~~be~~ and between some parties lie - upon a Bill or
note - but it is debt on simple contract:

Lex Mercatoria - Bills &c

1 B. & Pull: 24 a
2 Vile Ref. 122
Doug 6. 703.
not.
1 W. Bla: 249
505

This was formerly much used - but went out of use on account of Wager of Law - as the duty is duly proved the exact sum - But it has been lately revived & introduced in West minster Hall -

1 Wilson 185

It has been holden however that debt will not lie in favour of the payee vs the acceptor because there is no privity - But Mr Chitty thinks there is privity enough - for the acceptance amounts to a promise to pay to the holder whoever he is -

2 Ld Raym 848 -
Chitty 220

Cro Jac 687 -
Yelv: 23 -
2 Rolle 441
597 -

It has been determined that if A. delivers money to B. to be delivered by him to C. C. may maintain debt vs B. - This is a strong case -

Chitty 220.1.
Andrews: 486
10 Mod: 38 -
Bulej: 94 -
note -
Com by Dbt
A -
Ins 680

There is no doubt however but that debt will lie on a Bill or note between the parties in immediate privity - for as to them whenever the Com law raises a duty debt will lie -

Law Mercantile Insurance.

Ins. by Vandeveer.

Insurance.

Mercantile law it is said is the custom of Merchants. But this does not partake of the nature of a custom. which is the law of a particular place. A custom the Judges are not bound to take notice of of course. But the law Merch is not to be pleaded as a custom. nor is it to be proved as a fact. In all Countries there are many alterations by legislative acts, of the Mercantile law. It differs more from the Com law in its principles and this can be the only reason for calling it a particular custom. Whenever the custom of any particular place differs from the Com Mercantile law it must be shewn.

Policies now point out the difference between the Com law and Merc law. There is a singular trust in the Com law that where there are joint tenants of property and one dies. the survivor takes the property by jus accrescendi. In Com law they have no jus accrescendi. If a joint they have. And there shall be no joint tenancy unless the parties expressly make it so. But this principle of jus accrescendi does not hold in the Mercantile law in any transaction. Fraud in Merc law is viewed differently in the Mercantile and Com law. Fraud in the Consideration of a contract does not avoid it but fraud in the execution of it does.

Lex Mercatoria Insurance -

by the Com. Law - By fraud in execution of a Contract I mean where the party signs one Contract & where he supposes he was signing another - Such Contract is absolutely void - & in the Law of Equity is different from the Law - Equity will not enter here on a personal Contract but leave the party to recover damages at C. Law - But with respect to Contracts to Real property - they will set aside the Contract at once - But in Mercantile Law fraud entirely destroys the Contract & the party has been guilty of any equivocation or mental reservation whatever - There is the almost delicacy on the subject - Every fact must be disclosed - which the man may not be supposed to know as well as the other - -

At Com. Law the man can be made liable for any Courtesy or kindness you may show him - But you must observe - that where the Law imposes the duty on the man - as in case of a husband to support his Wife - you can recover - But you cannot lay a man under an obligation for rendering his property from impending destruction - as getting his sheep out a River &c

But in Mercantile Law it is otherwise - for you may subject a man for a Courtesy - or act of Kindness - & in there are many cases where a man has professed & wished to speculate he may recover - To the extent of what is worth in Court -

Lex Mercatoria - Insurance -

There is another difference - At Com Law if you have a debt vs two as joint debtors and you release one from the debt you take no security from him. It is a release of the other - But not so in Mercantile Law - for after a discharge of one you may impress on one - The Judge thinks that the Com Law doctrine is not founded in reason - But appears to have grown up without notice or examination - A Release of one is undoubtedly a release of all - But release of a man from jail - bears no resemblance to a Release under hand and seal - except that the name is the same - and from that circumstance has arisen the principle -

The principles of the Mercantile Law on this subject accord with reason.

In the Mercantile Law - Calendar Months are counted - In Com: Law - lunar months -

Where a sum of money is due on Sunday - at Com Law tender is good on Monday but by Mere Law it must be on Saturday -

At Com Law no chose in action could be sold - but Equity would protect the assd - but the suit must be brought in the name of the assor - who of course to avoid release -

Ley Mercatoria Insurance

But in the Mercantile law a Bargain & Contract is assignable. The Lawyers think with Blutt, that negotiable note were assignable at the Com. law - and that the stat of Ann was conformable to the Com law. For Merc law. the assee. may sue in his own name -

In Mercantile law the notice of non-payt must be given in a particular way as protest - in a Bill of exchange - This differs from Com. law.

At Com law. in all Contracts which are not Specialties you may go into the Consideration - But in the Mercantile law after a negotiable instrument has been assigned - it has the privilege of a Specialty - and the Consideration cannot be enquired into - This is another difference -

Another difference is that at Com law as soon as Bargain is clenched the property is vested - But there are cases in Mercanttle law. where the Bargain would be complete and yet the property subject to the control of the seller - And the latter place - where the seller hears after the Bargain that the Buyer is Bankrupt - the seller may stop

Lex Mercatoria - Insurance -

in transitu - unless they have been assigned to that person.

A Contract of Insurance generally is a contract entered into to indemnify another against any peril to which he may be exposed. But this is not all - for it may be a Contract of Insurance - if indemnifies against the not happening of a certain event.

The person who owns the risk is called the Insurer - and the consideration given is called the Premium - and the Contract entered into - is called a Policy of Insurance.

The English have but of late years made policies by that which declares all such Contracts utterly void - The prevailing opinion is that such Contracts were void before the Statute. In Engd - common wagers were good grounds of action - and it was difficult to tell why these wagers were not as good as the common ones - Therefore the Act was made - But in all the Northern Countries and in Holland wagers were void - by the Mercantile Law - and the Judges think they are at Common Law - Wagers are of no profitable service - The English that the Judges think is an Offspring of the Mercan

Lex Mercatoria - Insurance -

the Law of nations -

Insurances with respect to lives are
Leduc 11 series - as there is an Interest - they are good -

What persons may be insured - -

Any person may be insured except
an alien enemy - This has been a question in Eng-
land many very eminent men whether an alien enemy
could be insured - but the Law Merchant is very plain
that he cannot - There never has been a decision in
Marsd. de 31 favour of them the Lord Mansfield was strongly
Park. Ins: 242 inclined to have it so - In 1746 a Act was passed
forbidding the insurance of an alien enemy on
the ground of impolicy - But after words the
old practice of insurance recommenced - and at
the beginning of the present war - they again
passed a Act declaring the insurance void -
But the way they got over them without directly
declaring the Act was - they revived an old
presumption that you cannot sue on a Contract
made during a war - While the War lasts -
1 T. Rep. 484 In 1 T. Rep. 484 this case came before Lord Mans-
6 T. Rep. 23 - field - and he recovered the premium - The Solr
moved for a new trial on the ground that the
property was enemys property - but Ld Mansfield
overruled the Motion because the policy was
good on the face - & affirmed that the property
was neutral - The question then was not

Lex Mercatoria. Bills of exchange -

Lord Ky decided - Pr 6 T. R: 23. the case of an
action before Lord Kenyon - but it was not de-
cided, decreed - Pr Ld Ky they allow recoveries -
on Ransom Bills. But the has passed dubente to:
Pr the case in 3 Burr 1784 - Ld Mansfield differ-
ed a recovery on a Ransom Bill after the war.
during the peace -

3 Burr 1784 -

The general rule undoubtedly is
that you cannot trade with an enemy dur-
ing the war - But there are exceptions.
as where an Englishman should be in France at the 6 T. Rep. 35 -
declaration of a War between two countries -
and should have property there he certainly may
insure it -

Another question has been made
whether the property of a neutral domiciled in an
enemys country could be insured - The case was
An Englishman went to France and during 6 T. Rep 480
the war had his property insured in Engd - and
then drew up the question - The Ct decided -
that there was not neither the - that it being no
advantage to the enemy - He was in partnership
with a Frenchman but had only his own pri
vate property insured -

Who may insure by the law Merchant -

Any persons in their individual ca-
pacities or any Company persons may insure by

Lex Mercatoria Insurance.

the Law Merchant. The English have taken a power of ensuring from the Companies ex. the Royal Exchange and the London Insurance. With respect to the Individuals the Stat made no alterations. it remains with them as before. This Stat was in 6 Geo: 1st.

When Individuals insure they set down their names each one for himself.

2 Wh. Bla 379. Dia March: 41. to 47. On this Stat some questions have arisen. What I will mention. As where A has secret intrest in B. ens an ensures. and there is a loss. there can be no recovery vs B.

Park. Ins 8. There is another question case very strong. A & B were partners as before. there was a loss. B sent his money to a broker to pay A owe to A. but it was decided A could not recover it from the Broker. The Judge is inclined to doubt the correctness of the decision. he being the agent of both. the payment to the Broker being be thenhe a payt to A.

6 T. R. 1, 05. What thus insurance is to be made upon

A. Ship and the goods on board. are the proper subjects of Insurance. and the freight may be insured. Bottomry Bonds may be insured. Bottomry Bonds are where money is borrowed on more than legal interest by a fellow who means

to serve not properly in a sense. This is not usury because there is a risk run—

Some goods cannot be insured and if they are the insurance is of course void. Smuggled goods cannot be insured. By these are meant goods that are prohibited to be imported or exported from a Country.

It has been made a question whether the Insurer would not be liable to the insured if he knew that the goods were to be smuggled. It is now well settled that he will not be liable even if he knew all about the law lays a hard hand upon all such Contracts. Conf 346

There is another question of more importance which is. whether an insurance on goods in a foreign Country where such insurance is void. is good. The English law settles this point that such Insurance is not unlawful. and binding upon the Insurer. One nation they say have nothing to do with the revenue laws of another— Park 237. Doug: Blanchard vs. United States March 53.

Insurance upon Contraband of War is illegal and of course not binding— What is contraband is very well settled by the Writers on the laws of nations. Arms. all munitions of War. fitted for use are contraband— and if taken the goods are to be confiscated—

Ley Mercatoria. Insurance -

Grotius Book 3: Ch: 1 to 7- 3 Vattel 7-

Some things are sometimes contraband of war and at others not - as horses for instance As to provisions they are not contraband. tho one French Cut Throat says they are -

All this matter is usually regulated by Treaty - and then insurance would be legal -

There are some things that may usually be carried but that cannot from something that has taken place - as a Siege or Blockade - But where the Insurer assures without knowledge of the Blockade he is liable if there is a loss -

If the siege or blockade are notorious you have no business to go there - But it has long been settled that a particular port may be declared to be blockaded - this was an innovation upon French Law - From this they went further & can blockade by declaration a whole Coast - Both these are contrary to the laws of nations -

With respect to the right of search - this is a necessary consequence of the Law of Nations - how else can it be possible to know whether the neutral has contraband on board or no: This right has always been admitted - but the manner in which it is to be done is generally regulated by treaty -

Vattel m. 7

Lex Mercatoria Insurance-

To carry contraband of War - is no offence by the law of Nations - if the goods can be got there safe all is well -

The right of search does not extend to ships of War -

Insurances upon Embargoes of foreign nations - are good - But an insurance upon the Embargo Laws of the Country in which it is made - is invalid - and there can be no recovery upon them -

Park 234 - Doug 234 Johnson vs Sutton

March 28th -

Commerce with an enemy is unlawfull and insurance on such Commerce of course void - Yesterday mentioned some of the exceptions to the rule -

A purchases goods in an enemys Country in time of war - but he a been trading in that Country before that war - The Ct understood that insurance on such property was good - of course such commerce with an enemy is not unlawful -

1 B & Pull 374

The other Ct determined on the same question - that there could be no recovery on a policy - because the commerce was unnecessary -

6 T.R 548

So upon the whole it seems that there are some cases where a man may trade with an enemy and of course insurance may be made -

Seamen Captures Waters can never

Lex Mercatoria Insurance

7 T. Rep. 157- 3 Burr. 1912 1 Bla. Rel. 594 Emerigon 284

ensure their wages. The principle is that the burthen must fall equally - and seamens wages are always lost if the vessel is lost. The reason of the rule is obvious to excite interest in them to preserve the vessel by every exertion -

1 Park. 236

This is not extended to the seamens goods. clothes. chests. but only to their wages -

The owner may insure the freight i.e what she may earn - But the circumstances under which he may insure it. Powle mentioned. - The voyage must be begun to run - But if the Cargo is only partly on Board. the voyage is begun to be run. and the Insurer is liable for what the Ship would earn during the voyage -

But suppose a vessel is going to a certain port to take on Board the Cargo - and is lost before the freight is on board and the Insurer is liable - But seems if the vessel is in harbour - and no part of the Cargo is on board -

The general Mer. law. is that the expected profit is not an insurable interest.

Park 267 - This is the general law -

Lay Mercantile Insurance.

Their Hole. It was decided that it was not an insurable interest.

In the case in Parks before mentioned the policy was valued. Which is an insurance for a particular sum. Open policy is insurance of the goods and the value of them is determined by the event. In case of a valid policy the value of the goods as determined by the Insurers is binding but there can be an enquiry whether it was only a Cover for a Wager. Comp. 583

This case in Parks was an insurance valid. and it was a bona fide transaction. The fact is the Ct did not in their Cases touch the question whether profits or no are insurable interest. This is the only case and I do not think that here the question was settled whether profits could be insured.

When you are upon a valued policy & part. al loss. you may treated as an open one. and the value of the goods enquired into.

Is a Wagering policy a good one? This is settled by Stat in Engd. The first decisions were against them as void. But afterwards they were held valid and then produced the Stat. The reason of these decisions

Key Mercantile Insurance

Be explained to you over that they admitted wagers were valid - But even admitting wagers to be good - they differ entirely from wagering policies - Wagers are always to gain some thing - Wagering policy is an indemnification against a loss - Here certainly is a difference

The Lords Chancellor upon principle that no wager is good - The Precedents however are the other way - In 11 Coke Rep. 76 - it was decided that it could be recovered upon - again 1 Lev 133 - 5 Burr 2605 - After this they viewed them with a jealous eye - and said that wagers upon a policy could not be recovered upon in 2 T. Rep. 56 in Cowp - 782 - 2 T. Rep. 610 -

In Cowp. 27. it was determined that an innocent wager could be recovered upon - Ashurst & Willes the law was that any wagers could be recovered upon - Buller said it was not too late to resort to principle and therefore he decided that they were void - but the other Lords held Contra

The Lords Chancellor in this Country ought to resort to principle - In most the commercial Countries of Europe - Wagering policies have been rooted out - In Italy and Holland &c &c -

Ley Mortalois Insurance.

Show: 156. It was decided that a wagering policy was void. The next year it was decided by Chy that the policy should be delivered and the premium paid back. — 1 Show 156 — 2 Vern 260

Pr 1700 - it was decided to be good - 1716 - Chy still held them to be void - but the next Chy held them good - — 10 Mod 77 — Lucas Rep - 2 Vern 716 - 717 -

Afterward C. J. Lees decided them good - Pr the 19th Geo: 2nd a stat was passed on the subject. — 2 Blac 1250 — 1 Burr 614 - 6 T. Rep 23 -

This was very important given in Engd - but that is confined only to the Ships of a subject. — Doug - The Hollopon vs Belchier

~~Not a~~ good ~~possession~~ ~~the Person~~.

He who has the absolute and he who has the qualified property or he who has the legal and he who has equitable may insure - and it will not be a double insurance - and this is very reasonable. — 1 Burr 489 - 1 T. Rep 745 -

There is a species of interest depending on a Contingency which is an insurable one - but neither legal or equitable - as where a vessel is sailed by one his Majesty's property the interest in that vessel may be insured but there is no legal — Marshall 64

Lex Mercatoria - Insurance -

or equitable interest - for A is only a trustee for Brown. Wherever then there is an insurable interest upon that the property such policy may be insured, or may insure - Thus trustees Agents &c may insure - It has been decided 8 T Rep. 13 13 & 8 Rep 15 more that resting equitable interest may insure

Bottomry & Bonds are insurable interest -

~~Cowp 390~~ -

It has been contended ~~to Oliver that~~ Marsh: 111 a value subsisting is void - But the Ct will always suffer you to prove that it is a mere cover for a Bet - and then get over the objection - When there is a total loss - the whole is recovered but so even where there is a partial loss

Attendee

A Re insurance - is good - it is when the Insurer becomes insolvent - the insured may insure again - A Re insurance is the insuring of a risk by an underwriter - such he has insured - The English have adopted them except in the above case

Lex Mercatoria

Insurance

March 26th 1813

A double Insurance is where A. owner insures the same property, more than once at different offices. Plus stances on the same grounds as at the common law. the Insurances are all good - but there can be but one satisfaction - over you may resort to which you please.

One those who do pay may resort to those who have not paid for their reliable proportion - there is a matter between the Insurers themselves - the former decisions were - the other way. that, and - whoever first subscribed were first liable and the others bound to pay back the premium.

Beawes L. Mo. 246

1 Show. 132

Where persons have different interests the law does not subject to the average to be consonant to the common stat. It would seem that the recovery on policies in such situation ought to be according to the quantum of interest but it is the law that the parties recover the amount of their policies -
See Bynkershoek

1 Burr. 489

Where the voyage is unlawful the Insurance is void - a question is different from the commerce which affects only the articles - The voyage is unlawful when

Lex Mercatoria

Insurance

that seems perhaps navigating to a certain port or where there is a monopoly.

6 T.R. 31 In treaty of that country with Portugal there was an entire end making our vessels in the ports of the East Indies. And a question arose whether a circuitous voyage was within the treaty, if it was the Insurers were liable. if not. then the Insurers were discharged. The Ct decided that the voyage was lawful.

1 Bos: 230 Another question arose in this case was a native Englishman residing in America was one of the proprietors and the question was whether he was included in the treaty. The rule is that a neutral born citizen of any country is a citizen of any other for the purposes of commerce. This is laid down by Vattel.

The risks.

The Insurance may be made as all risks incident to the voyage. The Insurance expt a Insurers own misconduct is valid. And an Insurance is good upon any lawful but unlawful voyage. and then almost all risk cannot be insured expt.

Lex Mercatoria Insurance.

Perils of the Seas. Men of War. Fire. Enemy. Pirates. Robbers. Thieves. Letters of Mart & Countermart. Surprisals. Takings at Sea. Barratry of the Master or Mariners. and all other like Losses and Misfortunes. are insured in the Policy.

Suppose a Vessel is insured only against the Perils of the Seas, and she is taken by a French Privateer after being driven out of her course by a Tempest. are the Insurers liable? No. The cause [illegible] always regards.

Where a Vessel was insured among other things at 5 per Cent not exceeding. and she was captured. and then burnt. the Court determined that the Insurers were not liable.

The Insurers are liable for a total or partial loss. except when the loss partial does not exceed One per Cent. this was the old Rule. But now all Insurers add a Memorandum to the Policy. which alters the Provisions. In Case of a partial loss certain articles cannot be recovered at all. The Memorandum is Fish. Salt. Fruit. Flour and Seeds. If there is a Leakage

loss. & there the Insurers are not liable
Marsh 140. unless the loss is general or the Ship
is stranded.

There are other articles which if
there is a partial loss - there shall be no
recovery unless the loss exceeds 5 per Cent
which are hides & skins. hemp to be exempt 5 per
cent & then on off when there is no recovery unless the loss
3 per cent This Memorandum you see changes
the nature of the Policy.

But partial loss is to be recovered
provided the loss is general - which is that
loss which the property saved has to come in
for share of the loss.

The next exception is unless the
Ship is stranded - does this mean that you
must pay for a partial loss if the Ship is
stranded even if it happened before - or that
you must pay for the loss partial occa
sioned by the stranding. This has been a
great question in Engd.

3 Burr 1350 The first decision was that you must
Cooke 116- pay for a partial loss if the Ship stranded
T. T. Ref. 216- let it happen when it would - After much
4 T. Ref. 783- Ld Mansfield and Justice Buller determined
7 T. Ref. 210 & Kenyon. this in the underwriters favour - Ld Kenyon
1 Bos Ref. 416

Lex Mercatoria Insurance.

after was determined in favour of the first opinion.-

The Insurers may state any loss for which they please-

Where the loss is occasioned by the Misconduct of the owner or Masters of a Vessel the Insurer is discharged - Now there must be some mismanagement - Suppose the Ship is lost from the fact that the Ship is not sea worthy - even tho' the defect is such the Insurers are not liable. There is always an implied Warranty on the part of the owners that the Ship is sea worthy.-

If the loss is occasioned by bad stowage or the embezzlement of the owners are liable and Insurers are discharged - It is the masters own Misconduct -

A number of fellow sailors combine themselves first - get employment on Board of a Ship - and rob the Ship - The Ct held that the owners were liable - This case went upon the ground that their vessel was not in the body of the County, and consequently be a common Carrier by C. Law - the owner was liable Thus contrary to the Mercantile Law -

If Goods are lost in Landing or put

Amer: 580

1 Newtr: 196
Th Raym 220-
Beames L M 313-

Lex Mercatoria Insurance

Answer: 678 any on board - if the loss happened by the miscarriage of the Master then the Insurer is not liable but the owners - But if it happened from some accident over which they had no control the Insurer

March 29th is liable -

In order to charge the Insurer the loss must happen during the continuance of the risk. If the Insurance is for a certain time there is no difficulty. A common way of insurance is at and from a place and sometimes only from a place

The risk on goods Commences with the putting them in boats to put them on board unless otherwise expressed - But is however now regulated by the policy and the risk commences with the delivery them on board and insured from that time tho they are safely landed and discharged If the goods are unnecessarily moved from one vessel to another the Insurers are discharged unless there is a clause to that effect in the policy and unless they are removed on the grounds of necessity - as if the ship sprung a leak &c

Lex Mercatoria Insurance

Where goods were insured from Engd to Gibraltar which were to go from there to another place - 1 Burr 648
in another ship - and when the goods arrived there was no ship. They were put on Board a store ship and lost - the Insurers were held liable -

It is the duty of the Insured to see the goods landed - and if there is an unnecessary delay the Insurer is discharged in case of loss -

If goods are put on board of the ship 7 Ann 1236
by the ships boats the Insurer is liable tho they are landed - but if they are put on land by the mans own boats the Insurer is not liable - But if a common lighter is used - and the goods are lost the Insurer is liable - This Marsh. 166.
is a strange distinction -

I have observed the landing is to be in reasonable time - but this may be regulated by the Custom of the particular places - and indeed in some places the custom is never to land - as on the Coast of Guinea - A Ship arrived on the Coast of Guinea on Park. 314
the 4th May - and the mate returned on 4 June

Lex Mercatoria Insurance

The Ct held that the Insurers were liable upon that the custom of trade must govern—

Noble vs Kennoway

In Douglas. there is the Labrador Case. which shows this principle. The defence was that there was no usage of trade for that the trade had not long been carried on. But Ld Mansfield said that it was enough to prove that such had been the custom from the time the trade began—

Duration of Risk on Ships—

If for a limited time there is no difficulty. If from a port. the risk begins from the time the ship sails. when she turns back. If from a port the risk runs during the time she is in harbour. But if the voyage is given up. or where she stays an unreasonable time. the Insurer is discharged. If from a port. the risk commences from the subscription of the policy—

This risk certainly last all the time she is at sea. but there is now made regulated by the policy.

But suppose that insurance is made from N York to Lisbon. & suppose

Lex Mercatoria Insurance-

by the wenters on this subject that if the vessel arrived at the port and anchored there the Insurance is at an-

But they insert a clause now in the Park 35
policy - to this effect from St Yorks to Lisbon being safely anchored 24 hours - This of course makes it plain.

The question has arisen what is being 1 T. Rep. 216
anchored there in safety - Where a vessel bound
to Jamaica for convoy - the very day after she came
at Portsmouth - it was held the Insurers were discharged - tho the cause of the risk existed before the arrived - yet that was not the meaning of the policy -

Analagous to this is the case where a ship
the Lord Stuck in rock three days before the
Insurance ended - and she was kept aboard
three days after - the Insurers were discharged

But where a ship having moored, but within
the 24 hours, is ordered to perform quarantine.
the risk continues - 2 Atk 124 &c -
Park Ins. 211

With respect to the general insurance
of without the twenty 24 hours - the same Merchant
as Phanix Stated -

Lex Mercatoria — Insurance

When a vessel is ensured from N. York to
1 Black. 117 to Martinique. no particular port, and the goods are to be delivered at different ports the law is now settled. that if the ensurer at the first port and is anchored there for 24 hours in good safety the Insurers are discharged. This is a very common method of Insurance

There is an ensurance upon the furniture tackel and appareling and provisions distinct from any other. because these are never landed. and if they are lost. the Insurer is liable. If it is necessary to put them ashore
1 Burr 341 4 T. Rep 206 and they are lost. the Insurer is liable.

If there is a particular usage different from the general usage. it need not be mentioned in the policy. because the Insurer is supposed to know all about it. Suppose
Bourgeois vs Wilson the language is to load stay and trade. on the Insurer is liable. by stay is meant the common course of trade

Park 411. 1050- But in the trade to East Indies. the custom is send back the vessel from Calcutta to Madras & back and so. and she is lost. the Insurer is liable. if that is the custom of trade.

1 Bob 610- When the policy is merely to load. and she stays and

leader and there is a loss - the Insurer is discharged -

The Duration of Risks on ~~freight~~ -

The commences when the goods & the 1281.
are put on Board - and lasts exactly as long as
that on the ship - There is an exception to this -
rule where the vessel sails from one port to 3 T.R. 362
another and she is lost. the Insurers are liable 6 T.R. 478
for the freight - even tho not on board -

There is no such thing as changing
the risk - It is not to be altered - A ship was insured
from A to B - and it was found difficult
to get seamen - they then as here to seamen - procured
letters of mangue - without meaning to use
them - This laid a temptation before the Captain
to deviate - and the lot held the Insurers dis-
charged - (But even tho there was an actual 5 T. Rep. 560
intention to deviate - and she does not
deviate - the Insurers are liable - but here -
there was only a temptation to an intention -

In another case precisely the same
except that the letters of mangue were not
good - the Insurer was held liable - One reason
of their decision was that there was an insen

Lex Mercatoria Insurance

6 T. Rep. 379 - except the Barratry of the Captain —

Of the Policy —

A policy is a writing of indemnity, against the losses insured against. The engagements in the policy are all to be performed by the Insurer — And a suit upon the policy the Insurer is precluded by the words of the policy from saying that he has received no premium. But in an action by the Insurer for the premium the policy is no evidence that he has received it, tho it is so expressed —

It was formerly the practice to insert in the policy interest or no interest, but now since wagering policies are void, such a clause is useless —

Policies are of two kinds open and valued —

An open policy is where the Insurance is general upon the property and in which the value not being inserted must be proved on the trial —

2 Burr 1191 A valued policy is where the value of the thing insured is settled by agreement between the parties — and it is in the nature of liquidated damages. So as to dispense with the necessity of proving it in case of a total loss — The effect of a valued policy is not to exclude the assurer from showing that the assured had no interest in the policy or wager. —

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It is evident to every body that the valuation in the policy opens the door for fraud and wagering. If it is proved that there was really no interest the insurance will be void. But if the assured has a real interest tho' it may not be precisely equal to the valuation in the policy the Courts will not consider it as a wagering policy. Sometimes there is a very great disparity yet if there is no fraud the insurance is good. 2 Burr 716

But suppose the Underwriter has insured a Cargo valued at 10000ℓ when it is not in truth worth 1000ℓ. If the real value was concealed by the assured it was a manifest fraud and will discharge the Insurer. But suppose the disproportion had been communicated to the Underwriter at the time of procuring the insurance. The contract would then be a wagering contract and therefore void.

When the loss is partial there is no difference between a valued and an open policy.

Insurances are commonly procured by Brokers and not by the parties themselves and the Insurer commonly looks to the Broker for his premium. But if the underwriter cannot recover of the Broker the premium he may by the Law Merchant and the general Com: Law recover from the principal. By a particular custom of London however the Insurer can only resort to the Broker.

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It is very common for the person who wishes
5 Burr 2727 - to insure property, to employ the broker by
means of an agent. This agent must have any
sufficient authority to employ the Broker but
that is not necessary to enable the Broker to pro-
cure insurance.

There are certain cases where a man must
insure as an agent when he is so directed.

A Merchant abroad has effects in the hands of
an agent in N. York. and gives directions to his
agent to insure. Now on Com. Law principles the
debtor would not be obliged to put himself at
any trouble to accomodate his creditor. but
by the Mercantile law it is otherwise. One
duty cast on the agent to procure insurance
he is bound to do it. and if one has done busi-
ness for another as an agent. and has given him
no notice of a determination to withdraw from
the employment. he will be bound to procure
1 Wils: 22. insurance. when requested though he has no
2 Kirb. 188 effects.

If a Merch consigns property to another as a
security with a direction to procure insurance
if the Consignee accept the goods he is bound
to execute the agency.

The responsibility of the agent is very great.
If the agent neglects to procure insurance as
directed - or makes a false representation to the

Lex Mercatoria. Insurance.

underwriter. in cases cases by which Marsh: 208
insurers are discharged. in case of a loss the
assured must be allowed to recover of the agent -
any breach of the duty in the agent by which
the assured loses the benefit of his indemnity
subjects the former -

There has been a question whether a per-
son who gratuitously undertakes any thing
and fails - is liable - at Com. Law. it would
be a mere nudum pactum - But by the Law
Merch - in many cases the Undertaker would
be subjected in damages - The case cited how-
ever in the Books does not support this position
for there the person did actually set about the 1 Bos. Rep. 74
performance of his agreement and performed it
so badly - that the insurers were discharged -
this proves no more than the Com Law doctrine -

Fraud in the agent is the same as it 1 Bos. Rep. 12
respects the insurance as fraud in the assured -

The rule of damages against the agent is the
same as against the Insurer -

If in consequence of the conduct
of the assured he could not recover of the Insu-
rer the agent in an action on it him for mis-
conduct on his part which would otherwise 1 Bos. Rep: 152
have subjected him may avail himself of the Park: 303 -
conduct of the assured. as a defence -

It very often happens that the agent being
an Insurer himself procures no policy but writes Sa. Ab 4

to the premium that he has obtained insurance at such a premium. In this case the assured may sue the agent on Trover for the policy and recover damages as if there actually had been one.

It was formerly the practice to omit the name of the assured altogether. But some inconveniences having arisen from this Statutes and Ordinances have been made in most commercial nations to prevent it.

The Ship must be specifically named if it can be done when named the ship to make the insurers liable must be from that ship and no other unless when property so removed is not before from one ship.

But in some cases as where property is to be transported from distant countries it is impossible to discover the name of the particular Ship which may have been. In this the insurances in such cases are on the Ship or Ships.

1 Emer: 104

The Species of the vessel should be also mentioned. but if by the mistake was not apparently increased or diminished the insurance would still be good.

Privateers and Letters of Marque should be insured as such.

By the law Merchant the name of the Captain should be mentioned unless a clause or any other matter is inserted. and in that case if there

Lex Mercatoria Insurance

never was any intention to employ the Capt
named it would be considered as to freight and
vitiate the policy -

The subject matter of the insurance must 1 Emer: 299.
be named though not specifically - 300

Bottomry Bonds must be insured eo nomine - 3 Burr 1394

If the goods are specifically named the Insurance
attaches to no others.

The usage of trade may with regard to Bot- Marsh 225
tomry Bonds and all others make a difference -
As in the India Trade bottomry Bonds are included
under the terms goods and merchandize -

There are certain articles which must be 1 T. Rep: 206.
specifically named as the Masters cloathing
Ships provisions and goods last to the deck -

In our trade to the West Indies are insured
Dust in these cases. Cargo on deck and on board
Cargo, Thus gives the Insurer as much notice
as to say goods cashed to the deck -

As to the question whether Jewells &c 1 Burr: 1996 -
fall under the denomination of goods if they are
carried out for the purpose of commerce they
do - The voyage must be accurately described. the
place where the risk begins and the port to which
the Ship is destined and if there is not wilfully done
the Insurer need be discharged -

Goods were insured from Genoa to London,

the Cargo was first on Board at Leghorn and went to Genoa where she lay several months and a loss occurring the policy was holden to be discharged.

Lord Eyres vs Bird. Where a vessel has liberty to remain six weeks it shall be construed to mean six weeks successively.

An insurance was made on a ship at and from Baltimore for Cadiz. She was cleared for Falmouth and was taken before she had arrived at the divarding point namely before she had left the Chesapeake. The insurance was discharged.

2 H. Bla. 343 Lord Mansfield vs Bayldon. It is agreed on all hands where there is an intention to deviate merely the insurer is not discharged. How does that differ from this case? The Court go upon this ground that the voyage was not truly described in the policy. The voyage to Cadiz was not in the contemplation of the owners.

Park 299- 2 T. Rep. 30.

Liberty was given in a policy to touch at a certain place but the ship did not touch there and was lost. It was holden that the Insurers were liable for it was optional with the assured to make use of this liberty which was given to them or not.

Lord Blanchet vs Fletcher.

March 29th.

It frequently happens that after a certain point on a voyage different courses may be taken. This is left to the discretion of the Master. But if one should be more safe than another the Insurer

Ley Mercatoria Insurance

7 & 8 Vict. 112

has a right to the discretion of the Capt. But if the assured give the Capt private instruction to go a certain course and loss happens the Insurers are discharged.

By the words "lost or not lost," is intended to cover losses which may happen at sea when the Ship is supposed to be in danger. But if the assured has heard any thing of his Ship and does not disclose the Insurer is discharged.

There is likewise a clause in the policy empowering the Master and Crew to do every thing reasonable to save the Ship in distress. They act as agents to the Insurers. And under this clause the Insurers are liable for the expenses and if there is a total loss the Insurer is liable to pay more than the total loss frequently.

The receipt of the premium must be inserted in the policy. the grounds of this have been explained.

The Memorandum follows the policy. on this there already has been a comment. This Mem^{m} only restrains the operation of the policy and is always attached to the policy. Vide Lecture.

A policy like other instruments may be altered where a mistake has intervened by

6 1 Vesey 317 the entertainment of a Court of Equity - But
1 Atk 545 this is not Mere equitable Law - Parol proof may
be introduced to show what was intended
by the parties -

Can parol proof may be admitted
to contradict a new clear instrument in the
Mercantile Law. The Com Law is clear that
it cannot - But it is said that it is admissible
in Mere Law. But the Judge thinks there
is no such Law - Malay says it cannot be
introduced - His Commentator says it has been
done by the English - The Judge found but one
2 Atk 444 decision on this point and the Case is report-
ed in half a dozen Reporters -

The next thing is what is done
by the Insured in the nature of Warranties

These are not Contracts on which suits
may be brought but only to discharge the
Insurer. They are all in the nature of a Condi-
tion precedent - It is an understanding that the
Goods are so and so -

The Warranties are either express
or implied - They sometimes affirm as that
the property is neutral - sometimes only exist

tory as that she shall sail on such day - and in both the cases if the warranties are not true - the Insurers are discharged from risq -

There is always an implied Warty that the Ship is seaworthy and the Ship shall be navigated with skill - and that she shall not perform any voyage but the one described - by the words - the Insurers are discharged -

If the Warty is not complied - the Insurance is void ab initio There is no enquiry whether the risk has become greater if the Warty is not fulfilled - the Insurance is void - however immaterial the risk increased - It is a condition precedent - without which there can be no recovery -

It is of no consequence whether the loss happens from the non fulfillment of the Warranty or not - Suppose they warrant that the Ship shall on 1st May with Convoy - and she dies not - but proceeds - the Insurer - is not liable - This too where the property is warranted neutral - but it is not - and it is not by Captures - the Insurer is not liable because there never was any liability attached

Lex Mercatoria Insurance -

A vessel was warranted to sail from Liverpool
D. Ref 343 with 50 - hands and she sailed away with 46 -
Comp 604 with an intention to take the remainder
after a few small distances - she did take them
on board and was afterwards captured - It was
argued that she was sailing in perfect safety
on the Coast of Engd - But there was not the
Warranty - and the Insurer is not liable -

Comyns - A Warranty must be on the same
Bize vs Fletcher parcel with the policy -
Comyns 790

There is an ex press Warranty that
the vessel shall sail before a given day, and
if she does not sail the Insurer is not liable -
even tho she was detained by an Embargo -
Comyns 784 If she was to sail on such a day she must
sail even tho the Port is detained by a storm -
by an Enemy, Pirates at the mouth of harbour

There is sometimes an hurricane
encountered a Warranty to sail after such a day.
Where a vessel was insured to sail after a certain
day from Martinico to Engd with liberty
to touch Guadaloupe - She sailed before the day
to go to Guadaloupe with an intention to
return to Martinique - and did not return -
The Insurers were held discharged

Lex Mercatoria. Insurance—

Where a vessel was to sail on or before a day from Jamaica to Engd. She did sail from Jamaica to another port but not of course to Engd. Without intention to commence her voyage she was induced to stay for the purpose of joining convoy. She was detained the two day after by Embargo. the Insurers were held liable—

This decision is not contrary to principle. for a vessel may go out of course to join convoy. and do go to Engd. although the Capt had no intention to go there. But if she, has gone to the other port for any purpose but to join a convoy. the Insurers would have been discharged—

Conf per 764
Comyn 601
Do — 607
Park 326
Conf: D —
The Lupon vs Ferguson —

The Warty to sail with convoy cannot be excused. What is a convoy. This is not left to the precept of the master but must be one appointed as convoy by Govt. Where if the convoy is by Govt. it is no matter how great or small the force is — The Insurer is liable if the vessel is lost in going to the place of rendezvous — for that is during with convoy —

Park 349

1 Salk 443

Where there are two convoy. the Insurer

1 Comyns 166 2 Atk 1265 — rendezvous must be gone to first and if that has left the next must be joined and if last the insurer is liable.

Bouf. Lilly vs Ehren — To sail with convoy is to sail with convoy the whole voyage. Where the vessels are going to different roads as in West Indies the Convoy takes them to a certain point and they then shift for themselves this is sailing with Convoy.

2 H. Bla: 551 Good authority.

There are some cases a little different A ship lying at Portola was warranted to sail with convoy to Engd. the rendezvous was at St Kitts. A frigate was sent to gallant her to St Kitts. But the ship being a bad sailer lost the Convoy and bore away for Engd. The insurer was held liable for she was considered as sailing with convoy.

Marsh: 269

Where a vessel was to sail from Oporto to Lisbon which was the rendezvous with a frigate and could join the harbour of Lisbon but bore away for Engd. the Insured was liable.

1 Bos & P: 211

Where the course of the trade is that the Convoy goes but for a certain distance and then to take another convoy if there is no convoy at the second place to be had the Insurer

is liable -

There is an implied Warranty in sailing with convoy that the Ship insured shall have sailing instructions from the commandant of the Convoy. If there is not complied with the Insurer is not liable

The Ship arrived at Newfoundland after convoy had gone. She sails neither Man of War and overtakes the Convoy and sails without getting instructions. The insurer was held not liable — Park 393

The Man of War was to have been sent of the Convoy. She did sail with convoy and ought to have had instructions after she joined the squadron.

It has been a question whether sailing instructions are absolutely necessary? The Judge thinks that sailing instructions are not absolute, no decision precedent for if the vessel cannot procure them. the Insurer will not be discharged But if she can and does not the Insurer is discharged 1 Bro Pub 5 — 2 Do 162 — Park 341 — 2 Marsh 1250

The vessel must continue with convoy if she can. Where a vessel good sailer did lose hours after the convoy sailed. the Insurer was discharged. Proof of Weather is excuse. Park 349 — Carth 214 — 1 Thom 340

Lex Mercatoria. Insurance—

If she is prevented without her own fault she is excused—But if it is from the fault of the Master the insurer is discharged—

There is a case where the Ship was to sail from Gottenburgh with convoy and was detained for two months and afterwards on a Convoy passing the harbour and giving the signals she sailed out and not being able to procure sailing instructions that night was captured by a French Privateer who had entered among the fleet during the night and the Insurers were holden liable—

March 30 The next Utility is that the property is neutral—This Utility contains something more than that the property is neutral but that the Capt shall so conduct and navigate that he shall not forfeit his neutrality. else the Insurer will not be liable—

If the property was neutral in fact at the time of insurance and becomes enemys property afterwards the Insurers are liable— because this could not be foreseen or known. The case in the margin is one in point.

Edgen vs Parkinson Doug—

A Certificate of a foreign Court that the property was not neutral is conclusive every where and no enquiry can be gone into to shew that it was neutral—This is the rule

1 Emer: 488

Lex Mercatoria. Insurance -

in every country except France. But the Ct must be a competent one -

When a French Consul has condemned property as not neutral. the question was whether the Insurers were liable it was determined that they were. A vessel was condemned by a French Consul in a port in Norway K. Bench determined that the Insurer were liable the judgt of the Consul not being binding. The Ct must be a competent — the judgt is not binding - 8 D. Rep. 268 Bruces 314

So a condemnation as good prize Park 566 has been held good to show that the property was not neutral - If the special grounds of the condemnation set forth is a distinct ground from its being neutral. then it does not falsify the Warranty and the Insurer is liable - An Insurance on ship was insured as neutral and captured and carried into Guadaloupe. the sentence of the Ct was that she was destined to an english Colony. The question was whether the Insurer was liable? The determination was that she was destined to an English port and on that ground she was condemned and not because she had seamen on board. The Insurer was held liable. 7 D. Rep. 523

Bernadiston Mallan Dong-

If the sentence is ambiguous so that you cannot infer with certainty that the property was neutral the Insurer is liable.

The precept declared that property was condemned to an enemy and that there was sufficient that Cabot there his papers thrown over board and therefore condemned the Ship. The Insurer was held liable

Byron vs Aguirre Dong

A decision that the property was not neutral is conclusive.

7 T. Rep. 631

There have been several attempts to discharge the Insurers because the foreign papers were obtained by fraud. But Lord Kenyon determined that the Insurers were liable as late as in 7 T. Rep. 631.

(Where certain papers are to be carried by Ships as bonds in treaties as Role d'Oleron, Consulate - by the law Merchant that is not grounds of condemnation. but only presumptive evidence that the property is enemys property. - But the party may rebut this presumption.)

In the case in 8. Rep. above cited the French Court determined that she was Enemys property. and another differs from the case 7 T. Rep. 823.

The Lord Chief Justice of the Exchequer has gone upon the rule above laid down that a part of

Lex Mercatoria. Insurance

Role d'Equipage - is not proof of condemnation. It would have been better. But they found themselves bound by the Budget that it was enemy's property. Lord Kenyon in subsequent days in this case that if every thing had been determined but that the property was the enemy's not be shewn he, himself felt himself bound by the Budget. W. Rob. 297

Facts recited in a Report are not conclusive. but only the sentence of condemnation - 8 Ves. 192

Forfeiture of Neutrality -

The thing that makes the greatest figure on this subject is whether if a vessel is taken because she assists herself that is a forfeiture of neutrality. It would seem that on Law Merchant principles this question could not be made. If there are goods contraband of War there must be a right of search. 12

There is a question whether enemy's goods in a neutral vessel can be taken by the Belligerent. i.e. transfer that makes free goods. The claim that it could not be taken is in Wheaton in 1701. who says it does plainly that it could not be taken down -

Lex Mercatoria Insurance.

In the oldest collection of Marine laws called Consulato del Mare it is said that Stay can be taken.

Afterwards Grotius lays down the same rule in the same words and the Europ writers have copied the rule from the above work.

Bynkershoek lays down the same rule. Malay speaks of it as the law of nations.

3 Vatt: Ad 7. Prob 103. 114. Vattel says the same in his work and there rule forms the law.

In 1553 they passed a decree in Finance that the ship should be condemned as well as the goods In 1653 they restored the law merch that ships were no longer liable but the goods were.

Emeri.

In treaty between Holland and U.S. the principle is recognized that enemy property could be taken but goods that on an armed ship was present the vessel should not be searched.

1785

This principle has been determined in Spain.

In 1664 a decree of Sweden recognized this principle.

To this principle there is not a single case to the contrary except one in the English Court reported in Peake.

Peake 363

Lex Mercatoria. Insurance.

The case was thus. It was a Dutch ship. She had enemys property on board. The Spanish ship demanded the right of search. and the Dutch resisted. and was captured. She was condemned because she resisted a Spanish Ordinance. which was according to the law Mercht. The Ct determined that the resistance was a forfeiture of neutrality and the Insurers liable. But they, the Ct condemned her because she broke a Spanish Ordinance but says the Judge there is nothing for that reputation was consonant to the law Mercht?

Dr & S. Rep 23. the question is settled and there must be found by the whole law. and is the last case on the question.

This has been a very popular doctrine among the powerful commercial nations of Europe but the northern powers did not like it. and in 1780. the armed neutrality was formed for the purpose of changing the law. but they never did change it. France made some small concession. but England only relaxed a little. A second armed neutrality was then formed but Lord Nelson soon taught them what was what. and made them scamper.

Dr & S. Rep 23

12

The real truth is that the vessel was sailing under all genuine colours. this would have been a reason for the decision. but the Ct. did not so rest their decision.

Lex Mercatoria. Insurance.

April 15th

It seems then from what has been said that a Policy that the Ship is neutral and she is condemned the Insurer is discharged. The Policy implies that altho the might be neutral yet if she was under circumstances that might lead to a condemnation as if she carried contraband of War &c. altho the property might be neutral. the Insurer is discharged. It also appears that a neutral Ship carrying enemys property the property is liable to a seizure.

When the Ship is carried into port and condemned that if it appears that the property was neutral the freight is belonging and the Insurers are not liable.

If the freight is not on the law of nations but on some particular ordinance the Insurer is liable.

The law of nations may be altered by treaty

The Cruisers of a Belligerent have a right to search Merchant Ships. but not Ships of March 21st War. No neutral Merchant Ship has a right to resist. and the penalty is a forfeiture of neutrality. and is a violation of Neutrality and the Insurer is discharged

Ler Mercatoria. Insurance -

I will now mention the violation of neutrality causing forfeiture from want of proper papers.

Neutrality is forfeited they may without sending without proper persons. But this is by no means a ground of condemnation. If there is any obligation on the part of the insured to carry papers - and he does not. the Insurer is discharged.

A Passport is a permission from the neutral State to sail - A Sea-letter is a specification of the nature and quantity of the Cargo - so they ought to have papers to prove the property

13

Roll. d. Equitage. Bill of sale - Log. Book Insurers are also proofs of neutrality - A want of these is prima evidence of something wrong - and warrants a detention - but not a condemnation - For her detention she shall not receive Costs -

The Insured have no right to enforce their risk upon the Insurer - The Ship must be navigated according to the treaty between the Belligerent and neutral - Not not according to the ordinances of the Belligerent

Ley Mercatoria Ins

7 T.R 705

In treaty between America & France it was stipulated that the ships of each nation when neutral should sail with a passport An American ship sailed from London to Guernsey and then to Coast of Africa. When she left London she had no passport but she received it at Guernsey. She was captured by French on Coast of Africa. The papers were presented but she was carried in and condemned. The Insured sued the Insurer and is he liable. If this was a condition precedent that she should sail so as to be protected the condition was not complied with. Thus was the ground of the decision so absolutely ever attached to the Insurer

Park 362

Park 362

The French Assembly passed an ordinance that every Dutch carryer should be condemned. They seized a Portuguese neutral ship and condemned her. The Insurers were held liable. Had her condemnation only by the laws of nations or by treaty the Insurer would have been discharged

By the treaty Utrecht between Holland and France it was agreed that a certain document should be carried on. The property

was warranted neutral. but she had not the Parks 698
document. The Ct held that the Insurer was discharged. it being by Treaty. The Report makes him however speak a language which he never intended.

The doctrine then is that a breach of the Law of nation or a breach of an alteration of a by Treaty is a forfeiture of Neutrality but in 8 J. Rep. 343.
a warranty ordinance the breach of them are no forfeiture of it. Sweden condemnations under Berlin & Milan decrees. the Insurer have been held liable. 2 Dr. R. 343. is one of the most luminous arguments on the subject the Judge has ever seen.

Representations.

These are different from warranties and if made must avoid the policy These are either written or parol. They avoid the policy. if they are willful & than are fraudulent ~~or not~~ Park 176.

When there has been a false Representation no matter how the loss arises. the Insurer is not liable. Suppose the Ship is Represented sea boat when she is not. and the vessel is lost by tempest the policy is void. and the Insurer is not liable —

Comb 357
Barber vs Fletcher Doug.

These cases are not approved by the Elementary writers and I think rightly. The case was where a man did not represent but merely said he believed i.e. he guessed so and so. The Ct determined the policy binding and the Insurer liable. But the Judge thinks the Insurer ought to be discharged. There are similar cases cited in the case in the Management they do not meet the Judges approbation.

A representation need not be literally complied with and in this differs from a Warr. A person represented his vessel of 12 Guns and 20 men. but she had but 10 Guns. 16 men and 11 boys. The Ct held the representation good.

Comb 785

Every thing is a representation provided it is not on the face of the Policy. It may be referred to it.

A fellow makes a false Repsn to the first Underwriter. he then goes to the next and they will not enquire, insure. The question is as any person imposed on but the first underwriter. It is settled that they are all imposed on.

Comb. 786
Barber vs Fletcher

A. Barker represented that a ship was safe in Rivers Delaware on 11th Decbr. She ought to have been on the 25th. She was lost on the 9th

Mc Dowell vs Fraser Doug.

Lex Mercatoria. Insurance

Insurer discharged

A man wrote a letter to a fellow-
in London by Mail to insure his vessel - She 1 T. Rep. 12
heard of the loss of his ship before the letter
went on but it did go on - and the ship
was insured - Insurer discharged -

Suppose the Repn differs really -
from the policy. i.e. the policy makes the
voyage more extensive and dangerous than
the Repn - A Ship was insured in Eng. to -
go to E. Indies. China Persian &c - the Represen
tation left out that she was going out to
China and Persia - on her return she was 14 Bryan or Fletcher Doug
captured - The question was whether when
the voyage was extensive as the policy and
more than the Representation the Insurer
was liable The Ct said yes - there was no fraud.

A Ship was insured from London
to Newfd. - when she cleared out she cleared
out to Ostend - there was a clause in the
policy - with liberty to touch at Ostend but
she sailed right on to Newfd. - and was lost.
This went upon Park 182.
the usage of Trade - the Insurers knew this as
well as the Insured - Insurers were held liable.

Lex Mercatoria Insurance

A concealment of a fact which ~~a prudent~~ ought to be disclosed - avoids the policy - whether the Insurer enquires or not - The Insured should inform whether the vessel has sailed ~~or the~~ nature of the employ - because one employ may be more dangerous than another -

So ~~too~~ if the insured conceals
2 Show 119 B facts which he has heard of but thinks is disclosure avoids the policy -

Park 182 - This was a case where the Insured told the Insurer would certainly sail on 21st the got ready and sailed on 23rd - The Insurer was discharged - The Judge ~~thinks~~ the true construction of this is that she was to sail by that time - See Park 181

A Merch had a vessel at Lee - and his clerk was informed that a certain vessel was taken which rendered it probable that the Merch's vessel was taken - The clk went and insured but in doing this he said nothing about the news - If this was done by the authorized agent - it would have been void - The Ct

Lex Mercatoria Insurance

ment upon the premium that there was premium - and the Insurer was discharged. Park 209

An owner received a letter from Lisbon saying that his vessel was sent on such a day - A vessel arrived which started the same day with the owner. and he then insured - without representing that she had sailed in company with the ship which had arrived. The Insurer was discharged - 1 Esp N. 373

There is a case where an innocent thing was concealment Not known to Insurer

Doubtful rumours ought to be disclosed as they are on insurance - A man had heard a report that his vessel was lost in a storm - he insured without telling this report - She was not lost in that storm but was afterwards captured. Insurer was discharged - 2 S. Hom 179 2 Sha 1183

Non-compliance with a private ordinance should be disclosed - or the policy will be void - This however goes on the supposition that the Insured knew -

Where an Insurer learns that a ship had arrived - and the owner knowing she was

lost insured his ship. the Insurer recovered
April 2nd back his premium.

There are certain that may not be disclosed even tho' asked on the Grounds that they may be as well known by one as the other. But every fact which would enhance the risk must be disclosed. Mere speculation need not be disclosed. As if the insured expects a War he is not obliged to tell his opinion. The Insurer is not at liberty to enquire for himself. But if he had heard of the declaration of War and gets insured at a peace premium. that would be a fraud. so too of a secret order of war which he had heard. must be disclosed. Hurricanes &c need not
3 Burr 1909. 1 Bla Rep 594. be disclosed.

There are certain cases of insurance when you need not disclose facts and there are when Privateers or vessels are insured. It is important that such facts should not be disclosed and the Insurer is not imposed upon.
Park 229.

There is no necessity for disclosing a
Park 194 3 Burr 1908 circumstance arising from a foreign ordinance. But this must be understood to mean that the insured does not know of the ordinance if he does know and the Insurer not he must disclose

Lex Mercatoria Insurance

Implied Warranties.

The first is the implied warranty that the Ship shall be sea worthy. i.e. that she is a staunch vessel. such a one as judicious persons would say was a safe one. In some Countries they have ale vessels surveyed.

The Insurers undertaking is as to unforeseen and unexpected disasters. so if the Ship has a Latent defect. the Insurer is discharged. And the Judge supposes where the vessel is surveyed and judged sea worthy it would be the same thing. perhaps however the case would be different where she had been surveyed by land.

Where a Ship is not lost in a Storm

15

Where the vessel is lost in a storm and the Insurer claims she was not sea worthy the proof turns upon the Insurer. Marshal 366 369.

Ignorance or innocence of the insured avails nothing. In Marsh 369. you will perceive this principle determined.

Where a Ship is insured abroad the vessel must be sea worthy. Park 221 5 Burr 2606

Lex Mercatoria — Insurance

The Ship must be sea worthy at the time of her departure. But if she become not sea-worthy afterwards. the Insurer is liable - as if she runs upon a Rock -

There is a case where a Ship sailed apparently very strong. but she had no sooner been few hours upon the strong current. it was not in the power of the Insurer to remove the presumption.

If the vessel do not put proper manned the Insurer is discharged - But if on voyage Mariners should become sick. the Insurer is liable - So too Capt if any entered must take a Cabot if that is usual else Insurer is not liable -

J.J.R. 160

The Ship too must be provided for in the usual manner - i.e. it must be reasonable - This depends on circumstances -

The next implied Wth is that the Ship shall not be changed unless there is necessity for it - Where the Ship is leaky. the goods may put on board another Ship - If the Capt uses a sound discretion in changing his goods - it is well -

Lex Mercatoria

On a voyage to East Indies vessel was wrecked on India Coast. The goods that were saved were brot to a good market and sold and money remitted in other goods. It was held that these goods were protected by the policy.

1 B.R. 611 note.

There is always a power vested in Exors to hire another vessel to prosecute the voyage. All the expences the Exors is at in salvage and unloading &c falls upon the Insurer. And if the goods were put on board another vessel and then cast away the Insurer you see may be put to more expense than the whole value.

1 Comyns 482. 2 do 576-681.

But the rule of insuring on a Voyage that is dispensed with in some cases.

Suppose a man in St. Yorks insures 10 000 ℔ goods on board a couple ships coming from India one is lost and the other arrives there they trade and two Indiamen 5000 on one & so much on another. The loss falls equally on both policies.

2 H. Blacks 565

An other implied Warranty is that Ship shall be navigated as the laws direct according to laws of the country and stipulations of Treaty. But there is no Warranty as to seal according to the Ordinances of Nations.

Ley Mercatoria Insurance

There is a case in the Books which has been misunderstood. A Ship sailed from America to Germany and captured by French privateer She was condemned as being enemy's property but not innocent neutral. The Insurers sued. In stating the grounds of their condemnation among other things they stated she had not complied with their ordinances and that according to treaty there must have a Role d'Equipage and that she had none. Now were the grounds stated by the Court in the condemnation. The decision was that they were not bound by them but questions were open to investigation. The point decided was that she was enemys property and that only was conclusive. In this case the Insurer was held liable.

8 J.R. 192
Marsh 386

April 4th 1813.

There is an implied with [illegible] that the Ship shall not deviate. If she does the Insurer is discharged. And altho it does not appear that there is a greater risk there makes no difference there is not the [illegible]. If the Ship goes the usual course that is no deviation. If there is a nearer course. If the nearest route is dangerous it is a deviation

a line of the vessel strike out a new course where the sea is known and not dangerous it is not a deviation - But there is no case to that point. And it is the way to go to those places the old road. So it is not a deviation to go to those places where it is customary to touch in that voyage tho the place is out of the direct course - 1 Burr 348

But a few instances of touching at a place will not warrant a going out of the way to touch there - It must be the usual course of ships in that voyage. A vessel from Scotland touched at the Isle of Man and then was not the usual course. The Insurer was discharged 2 Dow's 601.

The effect of the deviation is not to avoid the policy but from the time of the deviation the insurance is discharged But for loses before that he is liable. 2 D & Ray 840 2 Ball. 444

It has been contended that a vessel having deviated restores herself to her course unin jured the deviation is cured. But that was formerly a question. It is now settled that there is not the least any intentional deviation will discharge the Underwriter however small it may be - Beaw: 315

The policy may give liberty to touch at a particular port But if this not the case and it is not usual to touch there it will be a deviation to do it - 7 Bro. P.C. 449

But there may be several ports of discharge. In such case you must go to them in their order - If the order is fixed in the policy that must be the order - 6 J.R. 538

6 J. Rep: 533. But if the order is not pursued you must go to them in their numerical order. But with respect to this last case Pierce founds on another ground. The ship could not get into the first port in the order. So Pillans the deviation may be considered a deviation from necessity — and then will always excuse a deviation.

1 Bos: & P: 313. There is another point to be noticed. The insurance is made with liberty to touch at any port in a country. The ship is insured from Lisbon to London. Hence can she go south. No. The meaning is that you may touch at any port in the course of the voyage.

Lefebre vs Wilson. Co: vs Hector Comf: —

Letters of Marque. These have no right to cruize unless they make provision for it in the policy. They are to defend themselves and not to cruize for prizes. But they may chase an enemy which comes across them in their course. And this not a deviation. But where a letter of Marque which did chase an enemy and lost sight of her and then cruized for her. This was held a deviation.

Beaw: 316

There are such things as trading voyages in which it is customary to continue on one coast for a certain time. Such is the African trading voyages. But if the vessel continues much longer than usual this is an amount a deviation.

Park: 313

Where solely mentioned the rules with respect to a deviation where there are two courses. An intention to deviate. If the vessel is lost before she comes to the deviation point, rule not discharge.

Hus: 124

the Insurer. But if it is clear that the voyage ensured was never intended the policy is void and if she be lost even before she come to the dividing point the Insurer is discharged.

A deviation from necessity never discharges the Insurer. The Capt does all in his power and he deviates to avoid danger or is driven out of his course. A Tempest may drive a ship out of her course and it is no deviation and she need not return to her course unless that be safer. 1 Ves: 22.

So a want of necessary repairs will excuse a deviation to the first convenient port. The was an insurance from Port St George in the Indies to London. She was discovered to want repairs and went to Bengal. It was proved the nearest convenient port. 1 Atk: 545

A ship may go out of her course to join a Convoy. 2 Atk: 449. 3
So she may to avoid an enemy which is ensuing for her. Comp: 601

The case of deviation occasioned by Mutiny has been attended with some difficulty. There is an old case which seems to have settled the Eng: law. But I believe it is not the general and I know it is not the universal law thereof. The Capt of a letter of Marque took a prize and the Crew would go back. Here the Insurer was held liable for it was a deviation from necessity. Hai: 1264

I will now consider the losses arising from each particular peril. I will here mention to you what is meant by a total and partial loss.

Lex Mercatoria — Insurance —

The latter needs no explanation. But by a total loss is not meant merely the case where the whole thing is lost. Suppose a ship is cast away and the Salvage wont pay the freight that is a total loss and the insured may go for a total loss — But to do this the Insured must abandon all that can be saved to the Insurer. And whenever the voyage is frustrated or what is saved will not pay the freight the insured may abandon and sue for a total loss — There was a case of a privateer taken that was abandoned. But the owners did not know that she had previously taken a prize but this went to the Insurer.

Perils of the Sea. By these are meant Rocks Quick sands Tempests &c. But the loss may happen when it ought not were it not for these perils and yet the Insurer be discharged. To make the Insurer liable the peril insured agt must be the immediate cause. And yet there are some cases where it is difficult to determine to which cause the loss is to be attributed. If cattle are thrown over in a Tempest to lighten the ship. The Insurer is liable — But if by a long storm the cattle become diseased and their allowance is cut short this is not a loss by the perils of the sea. So where a ship was eat up with worms that was held not to be a loss by the perils of the sea —

1 Bac Abr 444

Lex Mercatoria Insurance-

There is a case of this Kind - A Ship is insured and her rigging is worn out and there is an insurement covering that. Here ordinary wear are insured agt. But those that are extraordinary are not insured agt - If a Ship is driven from her moorings & loses her anchor - the Insurer is liable But for ordinary wear and tear the Insurer is not liable -

2d An insurement agt running foul of a Ship at Sea. If there is by the negligence or misconduct of the Master or mariners the Insurer is discharged otherwise he is not -

3d Cent by fire - For then the Insurer is liable unless it is by the negligence of the master or mariners. A Ship coming from the Levant wanted to touch at Majorca. But the Inhabitants thought that she had the plague on board and burnt her - Here the Insurer was held liable Another case was this - A Ship from the Levant went into Marseilles. The Inhabitants tho' the plague was on board, but the Capt told them that the sickness was on account of bad provisions &c. They let him stay and the plague being found to be on board the People burnt her and the Insurer was held discharged - - - -

17

Lex Mercatoria

Insurance

April 5th 1815 - The next loss is that by Capture. There is a distinction between Detention and Capture - When the object is to make a prize of the ship it is a Capture - When the ship is taken for examination &c and goods &c it is a detention. It is not required whether the Capture was lawful or not - But if the elements neutral and captured and the proves not neutral Insurer is discharged

Capture is sometimes a total and sometimes a partial loss. The insured may always abandon and thus make a total or partial loss as the case may be. - If the vessel has been captured and goes on - there can be no abandonment. If the vessel is ransomed the Insurer must pay the salvage -

Capture is a total loss - and you may declare as for such - But if you hear that she was recaptured again in a few hours - this is but a partial loss - So if she was purchased for a sum - the loss is but partial - The recapturer gets no property in the thing recaptured unless it has been condemned - The property does not vest like condemnation -

2 Burr 695 - 99 -

This right of abandonment is a liberty of the Insured - it is not a thing that they are obliged to do -

1 Black 116 ransom -

All salvage ransoms are for benefit of Insurer -

Lex Mercatoria. Insurance

Ransom Bills were also considered as good 3 Burr 1734
as Money. but late decisions have shaken them.
They cannot recover upon them in Wager.

Another loss is by detention. which
is never enquired into whether legal or not.

There is a case decided in Genoa. The Pope of Corsu
formerly belonged to Venice. but was in a state of
Jarmene. The Venetians seized a Genoese Corn ship
for that Balena. The nations were at peace. The
question was whether there was Capture or detention
They determined it detention. for the object was
not private.

If a ship is arrested for not sailing according
to the laws of Countries or for not paying duties 2 Burr: 176
then is not insured agt.
It may be insured against
under detention. sailing so. and without paying
duties. have been determined Barratry

Whether Embargo is legal or not makes
no difference between Insurer and Insured.

There has been a question what is meant
by detaining by People. There is a case of Cherkina
a vessel loaded with Corn. sailed from Engt. and
she was stopt at where there was a scarcity
and took out the Corn. the Ct determined that 2 Dallas 260
the detention was not by the People by a 1 Salk 446
mob. The detention by Govt however unright
eous. subjects Insurer

Lex Mercatoria Insurance

Can Insured abandon in case of detention?

2 Burr 683 If the detention is so long that the voyage is frustrated. then there may be an abandonment but else the loss is partial -

2 Burr 1217 -

The next is that of Barratry. The law on this subject has been continually changing - I'll tell you what I think most reasonable. By Barratry is meant an insurance upon the misconduct of the Capt and Mariners. by the owner - The difficulty in the cases is to know what is meant by Barratry - In the Books it imports some fraud or misconduct upon the owners - The Owners insure vs the misconduct of the Capt - and Capt vs that of the Mariners - In 1 T. Rep 508 - the case was. A vessel sailed to Jamaica by careless mistake took her reckoning and found her herself upon Tenerriffe - instead of going on she turned off and went to the devil for all Owners - As there was no corrupt conduct in the Capt - it was determined not to be Barratry -

1 Atk. 545 -
2 Ld Raym 1349.
1 T. Rep 320 -

It is not barratry when the Mariners compel the Capt to turn back - This is by employed

2 Burr 1264

in the case of the letter of Marque before mentioned. The Ct said there was no wrong intention —

A letter of Marque went a cruising and was lost. The Ct held it was Barratry. There it was contended there was no fraud — But said. Barratry. The fraud was. that there was a breach of trust and that even where the intention was to benefit the owners. it was barratry. The letter of Mr had in this cruize plundered an American State. and the Ct determined Barratry upon both grounds. He in the latter case was guilty of Barratry, by misconduct. The owner of the Ship cannot commit Barratry agt himself — 6 J.R. 379 17 Ke/ 343 2 Sha 1173

If the Ship is plundered and the Capt is guilty of Barratry the Insurer — Com/ 143 17 Ke/ 82

But 3 J.R 279 the Ship was lost by smuggling if the Capt. this was barratry for it was breach of trust. But the Insurance was only for lawful trade. The Insurer was liable. The statement of the Reporter in this case the Judge thinks erroneous — 3 J.Ref 279.

Lex Mercatoria.

Insurance

The Master commits Barratry and the time of the policy expires and then the loss is seized. The rule is that is that the loss must be before the policy expires. This is a general rule.

17 H 282

Any conduct that is mischievous to the owner that implies a breach of trust is barratry. But if the thing is done and if you think that the owner would have advised the thing to be done even if there is a loss - it is no barratry - This is an opinion which the Judge says is peculiarly his own. - for in a case he was the only Judge on the Bench who made it. 4 Days not published yet

The loss by general average is insured agt. i.e. where the loss is sustained by parties to save the remaining Cargo and Ship. If the loss was for this it is a general average. the loser can resort to the Insurer - & many themselves the parties only bear the loss and the Insurer is liable. So if there is a composition with pirates that is loss by general average. So if ship is ransomed. or if that is defended and there is a loss - the Insurer is liable.

Beawes Lex. 6. 12 Bacon 63.

Petty average is never insured agt as petty

by that cause money.

The loss must be determined upon by the commanding Officer. If the loss does not contribute to the safety of the Ship and Cargo there is not a general average - So neither is it a general average if Ship springs a leak and particular goods are damaged.

Suppose in order to avoid an enemy some goods are landed and saved: but the vessel is lost. Shall the goods saved contribute to the loss? etc:

So if the Ship is in distress on a storm. If the vessel is thereby eased part of the Cargo is got out - they shall not go to satisfy loss of goods previously thrown over board -

But if the Ship is saved by the goods thrown over board - then the case is different -

Suppose goods are put on board lighter because Ship cant get over bar. the goods in lighter are lost - Ship is saved by that means and there is general average - But if the goods are saved - but the Ship is lost - they shall not contribute, because they did not contribute to the loss -

Moore 2 [illegible]

Lex Mercatoria. Insurance

April 6th

When a vessel neutral, is taken and carried into port - and it turns out that she was unjustly taken and acquitted the charges are general average and the Insurer is liable - So when forced into port by stress of weather to repair the expenses are general average -

Mere sea damage as such - which is not occasioned by saving the Cargo is the loss of the particular owners - there is no average - When the loss happens from a view to save the Cargo - and it has not that effect it is not a general average -

Beawes 150
28. K 407

1 East: 220
good cases

As to these damages the Ship Cargo and freight all bear part - The rule is what the value of the Ship would be worth at the port of delivery - This is the aggregate sum. The loss of each particular underwriter is in proportion to his property - as the whole loss is to the whole sum - This is usually settled by the parties but if they cannot they resort domestically -

The expense of Salvage is another loss insured agt - Salvage means not only the thing saved but the expence of saving them - Much confusion arises from confusion of terms -

Lex Mercatoria. Insurance

The Insurers are to pay the salvage - as where the Ship is retaken - but then must be before condemnation - By the Com law Merchts the recaptors the Ship then has were entitled to sometheing - It becomes important that we should have Insurance - for we have no ordinances regulating them - as all the European Nations have - 1 D Kay 393 2 Salk 654 7 Hawk Co 80

The Recaptors had a lien upon the property and they need not give up the till they were paid as if they could not agree they resort to Ct -

Are the Insurers bound to pay whatever the Insured have agreed upon between themselves This cannot be - and shews the necessity of the rule -

Right of Abandonment -

Where ever there is a right of abandonment there is a total loss - Tho' not vice versa - Where the voyage is lost as where they is captured or detained by Embargo - or shipwreck there is one case where they may abandon. Another is where the voyage is not lost but where the Ship is sunk and lost much property or where the has been captured and long detained there may be

an abandonment. When whatever is saved is less than the freight it is a total loss. When there is nothing to compare it with the Rule is different. The truth there may be an abandonment where the salvage is very high.

In other case. When the vessel has been injured and cannot be repaired without much expense. If the Insured give notice that they will not go on. there may be an abandonment

Capture is considered as a total loss and the owner may abandon as soon as he hears of it. If the owner does not however till he hears of the Recapture then he cannot abandon unless there has been a loss of the voyage. In one of these cases there is much law on the subject by Ld Mansfield.

2 Burr 696
17 Ves. 304.
3 Atk. 195.
2 Burr 683.

On the same principle that is a loss of voyage you may abandon for detention by Princes &c. In 2 Burr 1198 there is a case where insured could not abandon. and on this case there is much law.

1 Bla Rep. 276 same case.

The least after abandonment is as much the property of the Insurer as he was before of the Insured and all his acts are as binding

Lex Mercatoria. Insurance

on the Insurer as they were before on the Insured.)

The case was an insurance of a ship from Virginia to London - and was captured by a French privateer 6th May and 2 days after recaptured by an English Man of War. (See the case as in the margin) Holt to Mansfield has given much law on this subject -

2 Burr 1199 - 1 Ble Rep 276. Burr 683.

If the Capt after recapture finds the voyage cannot be pursued - the presumption is known by his acts. In the case of the ship was captured and the Capt returned to port and sold - and pursued the voyage - there it did there was no right of abandonment it being only a partial loss - The Insurer would be liable for the money -

Butler vs Fletcher Bunb 18 Geo II: 232

There is a right of abandonment - when the ship is wrecked - here is a total loss - the voyage is entirely frustrated - The Capt has the right however to save the property, carried away - and then it would be a partial loss unless the salvage exceeds the property - If the goods cannot be carried off - even if the whole of the goods are saved - it is a total loss - But there cannot be an abandonment where the loss is partial -

1 T. Rep 169 Park 116 Park 169 - 2 Atk 1065

Ley Mercatoria - Insurance

17 Ves Jr 608 — Abandonment must be made seasonably i.e. they must not be by title hear something more. The case in the Marginal note is one where the voyage was lost on the coast of Asia and the Insured gave direction to have the proceeds sent to them - the Ct would not suffer them afterwards to abandon -

Park 172
8 T. Rep: 268.

If the Insurers prevent the abandonment when it would have been made by any engagements or promises that they are liable on those promises - the ship shall be considered a total one - and then may abandon. notwithstanding

2 T. Rep 407 — The law with respect to vessels at sea which have not for some time been heard of is obscure and not well settled - There is a right of abandonment when the ship has been heard of for a length of time - If the ship has been abandoned and she then arrives she surely belongs to the Insurers - But suppose the Insurer does not want to take the ship & can he recover back the money he has had - some cases say yes and others no - If the Insured says the voyage is at an end as respects us then over - the Insurer can recover back his money -

1 Bos & P 172
2 T. Rep 170
2 Emer 147

Lex Mercatoria

Insurance

There is a case in 2 Burr in which Ld Mansfield Moses vs McFarlane
letters a little on this subject -

When the Insurance is a general one - i.e. on Ship and Cargo - the abandonment must be entire - If the Cargo consists of three distinct articles on there has been a general insurance you must abandon the whole if not else cases where you have insured one each distinct part of the Cargo - By an abandonment of Ship and Cargo - there is no abandonment of the freight - 2 Comyns 265 Do -- 237 - 2 Comyns 199

See 1 Ves: 98 - on a question which may hereby arise here - Marshall 76 -

Adjustment of losses -

If the loss is total and the policy is valued one that has already been mentioned - If the loss is partial and the policy valued it is the same as if the policy was open -

If the thing lost is capable of a distinct valuation then the value of the thing lost is to be recovered - 2 Burr 1070
But if there was some damnification as to the whole then the quantum of damages is enquired into -

Ley Mercatoria Insurance

When goods are partially damaged deduct what they are worth from the prime cost & the residue is the damage. This is the prime cost and not what they would fetch at the market. To the prime cost must be added duties repairs premiums if it is a valued policy. You have nothing to do with the value at the port of delivery. The ship is valued at what she would at the time she sailed.

With respect to the loss by Individuals. In valued policies the rule is not the difference between the valuation and the price in market the rule is the proportion that the loss is to the sum of what you can get in market and there is

2 Burr 1167 Thus suppose your cargo cost 30£ and good sells at 40 but the good cost 60£. here then the difference is 10£. Then the proportion of 10£ to 60£.

These are commonly adjusted between the parties but it is not always so. The common mode is for the assured to enclose the sum as are-

dence of his liability. - and then is conclusive evidence - i.e. till the warranty is shown. It has the same effect that any other obligation subscribed has -

Beames 308. 310- Park 116-

The return of the Premium -

There are some cases where the premium may be returned and some not and some where it is proportioned. The principle upon which the Insurer takes premium is that he runs a risk. as a general rule then where runs no risk. he is entitled to premium. But there are some cases. In case of Illegality you know it is a condition precedent to the liability, and where the Contract is void ab initio. the premium must be returned. -

So too when goods are not put on board - as there is no risk put on then should be no premium. When part of the goods are put on board - premium must be adjusted -

In case of wagering policies. there has been a question whether the premium can be recovered back. - Why should be - The decisions are that he cannot. The reason is that these men having agreed to break the laws of society and

such men the law will not stoop to help.
Lowry vs B Dampt - This is where they set down as choice. The law will not meddle with them. This is the reason why the premium cannot be recovered back. In this case it is said by Justice Buller that there can be a recovery, in such case where the Contract is executory. Thus the Judge thinks is replete with mischief. Suppose one agrees with another to smuggle goods & certainly would be a pernicious endowment to deal. This is now settled by the cases in the margin.

3 T.R. 166 Campbell

In a valued policy there can be no return of the premium if.

In case of insurance to protect a trade with the enemy the premium cannot be recovered back. for the same reason.

1 East 96
3 Burr 1909.

Question vegetat. It is feigned on the part of the Insured so as not to subject the Insurer can the premium be recovered?

The argument that shall is that no risk is run. The judge thinks that this argument

In the first cases in Ley. they that there can be no recovery back.

2 Burr 1196
2 T.R. 170
3 Burr 1364

Lex Mercatoria. Insurance

The law is now otherwise - and I think correctly. The Judge thinks there is a risk run - in case where fraud is practised upon - The case in Park is the first one this way - and afterwards the Ct in Campbell say that the premium shall be kept and that on the ground of policy -

Park 219

There is one case where there was no return of premium because the detent is a contingent - as in case of prizes - This is contingent - but it is well understood at the time -

8 S.R. 164

Apportionment of premium - It is not the case when part of the risk has been run that the premium is to be apportioned -

Cowp. 688 -

Where the risk has begun to be run - in some cases there is to be an apportionment and in some not - The ship sails on the day and abandoning the voyage returns there is no return of premium - If ship was to sail with convoy and does for a time and then jettisoned overboard, the risk having begun to run there is no return of premium -

Bennett vs Woodbridge

But suppose a vessel is insured from L. to B. at 10 per cent on outward bound voyage

and 22 pr Cent on the outward - and she is lost going out - Here the 10 pr Cent must be paid - for the 20 pr Cent has been tendered - viz. But if the insurance had been at 22 pr Ct and paid - then the whole must be paid - This has become the usual way of insuring in our Country -

When a vessel is to sail with a convoy and she arrives at the rendezvous after convoy sailed - and she goes on. They consider 3 Burr 1234 them two voyages - the one to the the place 1 Bulter 1 B & P 172 of rendezvous - and part of premium may be returned - the other from the place of the rendezvous to the port of destination -

A ship is insured at and from and she lies a while in harbour and voyage is given up - the Insurer is discharged - But says the Insurer the wch rain while you lay here Marsh 568 before the command or change of voyage. The first or alone then decision is that the premium must be kept but afterwards they went upon usage - The Judge thinks the principle in Marshall Marsh 568 n has not been overturned - because all the subsequent Decisions went upon the ground of usage - See Lex 666

Lex Mercatoria. Insurance April 8th

It is often stipulated in the policy, that the premium shall be returned on the happening of such an event.

The case was the premium or part of to be returned if she sailed with Convoy and arrived Jansen vs Boydell Doug. 7 Bl. R: 491 the sailed and arrived. The Ct determined that the Paremium should be returned. for this was contracted between the parties. The Insurers here inserted upon a particular hypothesis —

A vessel was insured from Oporto to London. if she sailed with Convoy part premium 2 Bos. P. 11 was to be returned. She did sail from Oporto with Convoy to Lisbon. which was rendezvous. the was driven out of her way. and bore away for Engd. The Ct determined part premium should be return but on the ground that she had done the best she could.

In all cases where the premium 2 Emer: 162. is to be returned the Insurer has a right to pr pr cent.

Bottomry & Respondentia Bonds.

The Money is loaned to the Merchant and the Ship is pledged for the security of the money. It is agreed that if Ship is lost the Merchant loses his money. if she returns he receives what

Lex Mercatoria. Insurance

2 Black: 458. never entered upon. This is a Bottomry Bond. This cannot be usury because there
Ins Law 284 the principal and interest have been put on
508. hazard. and there is a general rule —
Bendy 418.
1 Salk: 27.
1 Lev: 54
1 Vent: 236. The Ship not only but the person of the Borrower is likewise liable —

A Respondentia Bond differs from a Bottomry in this. that the goods are pledged and they may be sold

The Money you owe is at the risque of the lender. This contract resembles an insurance in several particulars. If no risque is run. there is no marine interest and there can be no recovery of the interest. It differs again materially from Insurance. The Insurer brings nothing. and when loss happens he becomes debtor. but the Borrower never becomes Debtor. In case of Insurance. Insurer has no lien upon Ship. Lender has. Insurer is liable for partial loss. Lender never. But for general average. he must pay his share. for it is his interest.

The origin of this custom was where in Barbary Countries Ships were pledged for money and from this arose

Lex Mercatoria. Insurance

2 B. C. 458 Pothi 12 - Malog Book Ch: 2

The money must be for the use of the ship there can be no wagering made in this way -

The Marine interest never attaches - but the risque commences - So if the does not sail the Bond with simple interest will only be recovered - There is a case where a man would not lend his money unless Borrower would covenant to sail. and he did covenant but did not perform - Lender recovered only simple interest -

1 Vern 263

The right of marine interest ceases with the risk -

1 Vin Ab 281

The grounds are the same as in case of Insurance - The Lender is not liable for any particular loss -

March 652

The vessel may be lost and yet the lender not lose his money - but in these cases the Insurer would not be liable - as where ship is not sea worthy -

2 Comer 509

A loss by smuggling will be a loss to lender if he is privy to the smuggling -

If a ship deviates the lender does not lose her marine interest -

Skinner 162

Changing the ship without any necessity with the Lender will not lose -

Lex Mercatoria Insurance

Park 423 Both respect to General average the Com. law Merch is silent. But they have a custom in Eng that in such case the Lender loses nothing. But it appears from this very that law Merch is the other way.

Procedure.

By the Com law Merch Questions of this nature belong to Cts of Admiralty. But in Eng it is otherwise here in Eng but are tried by the Com-law Courts. Cts of Admiralty, therefore have any thing to do with policies of insurance. Neither has Chancery any particular authority over them.

1 Atk 457
2 Atk 355
3 Bro P.C. 525

There is a clause in the policy that these questions shall be submitted and it has been settled that even after the decision the party may still bring his action.

2 Burr 1067
1 Nelson 129

What is the action? If it is by body corporate it must be an action of Covt but no indictment. The action is a special act. The Court states the substance of the policy and there is an averment that it was made according to custom of Merchants but there is no necessary. Narr then goes on to state all of any the special matter

Lex Mercatoria. Insurance

It then states the consideration. and that it was
states that Insurance was for so much
and that Insurer subscribed. On valued policy
it states the sum to be agreed upon.

The states that the vessel on
voyage described in policy &c then the loss
and they what peril. then notice of loss - and
breach of Contract for non payt - If the
loss has been adjusted you draw just such
a one as before. if you please -

If the policy is effected by an Agent
it must be stated to be a Contract by Agent.

There has been a question whether
when the policy is made there is only A & B. 2 B & P 156
and before loss - they take C in partnership
A & B can sue without C2 - It has been deter
mined that the parties whose names are
on the policy are sufficient -

Where two thou are insured - one 2 B. & Pull 240
may sue -

L.J. K. 723 -

Lex Mercatoria. Insurance

April 9th:

There is one thing you must remember that a loss may happen and yet the Insurer not be liable - As when vessel is to sail with convoy and is lost by storm not sailing with convoy - Thus you see is a condition precedent and without it there is no policy - and of course no liability on the part of insurer - But then sufficient to show that there was bona fide, and not complied with -

Park 62 - 4 T.R. 723 -

A vessel employed on the African trade and there negligence at port and of her receiving - and voyage prolonged - so that negroes died - Insurer was charged for loss by perils of the sea - But it said it was not by perils of sea The true cause was the mistake of the Captain - This could hardly be barratry for to constitute that there must be a violation of laws of morality

It is best to state your loss in the words of the policy - But if you declare in language that amounts to the thing itself it is the same - as when you say that ship was lost by perils of Master is same as to say barratry of Master

2 D Ray 1349 1 Atk: 581

Gross negligence amounts to fraud

Ley Mercantile Insurance

When the insured sue for salvage services it is Hardin Ca
not necessary to state these particulars but the 304
cause of the loss must be set forth. The quo modo
of loss you may give in evidence at the trial.

There is one case where you need
not declare upon state the policy. but give it in
evidence viz where you sue for premium. and
the action is one for money had & received.

Suppose Deft pleads gen issue.
and Pltff must prove all his allegations. and
the Deft may prove any thing that makes the con-
tract void ab initio. or any thing that has dis-
charged him since. He can show that Pltff had no interest
and then it would be good for nothing. He can
show that representation was fraudulent. or
that there was a concealment. that ship was not
sea worthy. that the voyage was not the one de-
scribed. or that there was a deviation. or that
there was no loss. or that some one or all of
them warranties were not complied with
and thus discharge himself of his liabilities.
Or too that there was a double insurance.
But between the Offices in this case there may be
a recovery for a ratiable proportion

Jon

When Insurer says that there is only a partial loss- and Insured says a total. he may tender so much and plead non est as to residue- There is a difference between the Mercantile and Com. law- Where damages are uncertain at C.L. there can be no tender but accus where there is a standard- as a market price.- But in the case above if the Insurer tenders right- it is a good tender--

If he omits tender he may bring money into Ct- At Com law there must be a tender before writ brot- but in Count and some other states there may be a tender at any time- But if he omits tender he may bring his money into Ct- but then must not in any case discharge the costs-

8 J. Rep. 35. In 6 J. Rep. 35- there was a question how suit should be brot in case of alien enemy- If the contract was made in time of peace- it is matter of abatement- merely- But if it was made in time of War it depends on the question whether such contracts are lawful- If it is- then plead non est- and show it unlawful.- Prof Reddy thinks that all Contracts made with enemy in time of War are not unlawful- It appears

Lex Mercatoria. Insurances —

to the Judge & defences on the time of the Contract and what it was made for — whether it is lawful or not.

There are sometimes a great number of Insurers — and formerly there were as many suits as there were Insurers. — It of City cities mind that if they would agree to submit by the verdict of one. the others suits should be stayed. The rule of Ct. is that if Defts will agree to submit by one verdict since they will agree to produce persons. it is well. But if they agree not. he cannot be compelled — but they will not hear his cause — This is called the Consolidation rule. They agree not to bring a writ of Error. Well suppose they do. It is a Contempt of Court —

As to testimony it has been said there is some difference between that in our Mercantile Law and C. L. but the Judge says there is little or no difference —

There is a case where it is said there is a difference. Where one Underwriter was sued. and another was called to prove fraud but was excluded. Why was he excluded? It was — B & P. 283
an interest in the question who be excluded here and if he proved fraud — he would not be

Lex Mercatoria. Insurance

liable. But now as Interest in the question
never Bent & Baker - does not exclude. So here
there is no difference -

Lee B. & A. R. — The Lords thereby every Agent must
be admitted as Witness - and if Baker is excluded
in Mer Law it is the only difference -

Proof —

Contract - the Policy, you must first prove
Alsager 456 Subscription proved - the Contract is proved.
It is well established that parol testimony can
be admitted in Mere Law. to vary a Written Contract -

But Witnesses may be examined as to
usage of trade explanatory of a clause in
the Policy - Suppose insurance on Goods had
always excluded Bottomry Bonds - But in
East India Trade there is usage to include
these Bonds - under Goods - Here then you
may prove this usage - And in this case you
Doug- can only enquire concerning the usage
lyon vs Bridge of Trade - A usage in trade is just the same as
a Custom in Com Law -

Lex Mercatoria. Insurance

April 10th

These policies are frequently procured by the Agents of the Insured - and their subscription is proved as in other cases. As they have the powers of Atty in their own hands - it is wonderful that more difficulties have not arisen - The case in Esp. there was no proof but that the man had been in habit of subscribing -

1 Esp. R. 61 -

When the Insured sue the Insurer can never deny that he has received the premium - for the policy is binding upon him - But sometimes when Insurer sues - the policy may be of no avail to the Insured -

The interest must be proved - and this is proved in various manners - as by bills of sale &c - bills of lading - & the like -

1 Esp. R. 373. 2 Doug. 707 - 2 Stra. 1127

A general averment of interest is sufficient - and if under that may prove any species of insurable interest - The quantum of interest is proved prima facie by the policy -

3 Burr 1346 - 1400

On a policy in Dead - Bottomry Bonds cannot be given in evidence except in the East India trade -

1 Black. 424 -

Ley Mercantile Insurance

1 Bla R 396 If a Respondentia Bond is insured. this is interest sufficient. (prima facie).—

After all this plff proceeds to show compliance with Britain. — That property the neutral is easily proved. — It must be proved that this was condemned as prize —

The true loss must be set upon the Warr — and the proof must go to that point. In showing the loss — you must prove that it happened during the risk — and in this 7 T R 158 case of goods — the Bill of lading is sufficient evidence —

In action vs Insurer for barratry of Master — if the defence is that Master is owner Insurer must show it —

Immediate damages only are recovered — but not remote — and on this the rule is the same in both Mercantile and 4 T. Rep 130 note — Com: Law. — as the Roman charter — In Com: Law we go directly to the value of the thing — at the time of the delivery —

In T. Reps as in margin the insurance was opt the loss of Masts — In making Some were killed — but others carried away, washed overboard, The Ct determined that those

Lex Mercatoria Insurance

killed were recoverable for by policy, but seamen as those who afterwards dropped overboard.-

There are cases to this purpose that insurance on wages or provisions &c. are not within the policy or the ship.-- Park 52, 54. 1 T Rep. 127.

The cases that contradict this

Since these decisions there was suit for loss of provisions put on shore. The Insured recovered. and the Ct determined that it was the same as if they were on board and they saying that they were insured with ship. The Judge thinks this most reasonable decision.- 4 T.R. 206

Captains Clothes and goods washed on board he must be particularly insured - Park 20

It is now settled that in action for total loss there may be a recovery for a partial loss - 2 Burr 904. 1 Bla Rep. 594.

Lex Mercatoria. Insurance

Insurance upon life.

This insurance is sometimes by way of annuity. ——

The Judge thinks that insurance on life where there is no interest is bad. In most countries they are forbidden. There are Writers of Law that they have not any disorders that tend to shorten life, or hurt up insured.

1 Ble R 312 Marsh 609 Park 437

On this Utty of good health there have been some cases. as where a man had gout physician said it did not tend to shorten the man ally.

Park 437 - Where there is no Utty the Insurer takes risk upon himself. except in case of fraud —

In all cases where you have any interest depending upon life of a person you may insure. It has been determined that a Creditor had an insurable interest in the life of his debtor.

The loss in such cases as these is always total.

There are exceptions always of this kind in the policy that the insurance shall be void if the insured dies by suicide duelling, or the hand of justice.

In these cases the debt must be lessen

during the time limited by the risk — even tho the cause arose before — See 2 Atk 354.

Insurance upon Insurance

It is a common thing to insure on several offices. After one insurance the insured must give notice to the second Insurer that the property has been once insured and then the second is liable only for that which is not covered by the first insurance —

There is always excepted in case of foreign invasion or usurped power — This usurped power does not mean Mobs Riots &c — 2 Wils 163.

After the words commotion was introduced. This insurance is opt. lost by Mobs — so determined by Lord Mansfield — March 688

The insured must have an interest at the time of the loss. Where it is not stipulated on the Contract that it shall go to any new it is a new personal Contract. 3 Bro P 499 2 Atk 554

It is said that immediate notice must be given of the loss —

Lex Mercatoria.

Charter Co.

April 13th

Charter Parties.

There are two kinds... one of them is where Merch^t agrees with owner or Master of ship to carry goods for him from A to B. and on the case may be back again. - Then is chartering the vessel. The other is where they, hire out the Master themselves.

This is a Contract in writing, and sealed and the action is always a Covt. A certain rate per ton is the most common rate agreed upon.

If the vessel is lost before the master her port of delivery the Charter party is at end. This is upon a mercantile principle of dividing loss as much as may be. If Ship is chartered out and outward, and is lost on her return - only the voyage home is lost. If Ship has chartered for 2 Vents. 212 voyage out & home no matter where she is lost. the freighters have nothing to pay.

If a Ship returns without cargo. Where the rate is so much per ton. the freighter has to pay as much as if he had a cargo where the cargo was not lost on account of some misconduct or neglegence of the Master.

If Master acts imprudently in navigating his ship. - Shall damage owner. Owner and Master are both liable. Wolff 246

Ley Mercatoria Charter Parties—

When the vessel is so injured as not to be able to proceed and the voyage thereby frustrated the Master has a right to procure another vessel to carry the goods.

But when the goods have been damaged the freighter may abandon and pay no freight. But freighter may order the goods and carry them forward but then Burr 96 & 2 and 96 & 96 they must pay a valuable proportion to the Master or Owner.

The law does not require the Contract to be in writing but it is most safe to have it in writing.

In Mercantile transactions the hirer always pays earnest money. then it is optional with the hirer to go on or not. if he does not he forfeits the earnest Money. So the Merchant may recede before the vessel is loaded. then the Merchant must pay back the earnest money and as much more. Thus you see when the Contract is not in writing.

When any injury happens to the property of the freighter either by default or misconduct the Master or Owner is liable. But not where the loss is by the act of God.

No special Contract entered into between

Lex Mercatoria

Charter Party

the Owners and the Master as to what shall have the benefit of the freight affects the freighter in any way - whatever -

Where freighters make their Contract with the owners - they look to him or them but not to the Master -

If the Contract is made with Master & hires the Owner - but here it goes for then it is the Com Law and hence the Master himself - By Com Law the agent never need hence himself - But not so you see in the case.

Where the vessel is hired and the Owners have nothing to do with disposal of the Master the law remains the same as to the loss - But then the Master is the hirers servant - and he has no claim upon owners for loss - in other respects there is no difference

Where the loss happens on port

1 Brooks: 190. 30 --- 238. 1 Mod 95. 2 Lev: 69. 2 Ray 918

There are some cases which say they come under the law of common carriers - the Judge say this not well settled - But I am to that they are not common carriers -

The Mere law gives to all Masters the power to provide conduct for necessaries so as to bind the owners - The law gives this

Lex Mercatoria. Part owners of vessels

pawnen - and it is no defence for the owners
to say that he agreed otherwise with the Master
the Master has power to pawn his Ship - the
Master is liable personally - This liability at
L. Merc is very extensive

Where Ship is pawned the pawnee
cannot retain it - and in this it differs from
the Com Law - where the pledge is always
returned -

1 Hawk P.C. 376
2 Vern 443.
do — 643.
Comyn 656 -
1 Ld. Raym 73 -
do 1086 -
1 Ves Sen 119
1 Bro Ca Ch 95
Hawk Ca 95 -
do 195 - 376 -
Com Dig 2 Vin
230 t

April 14th -

Part Owners of Vessels -

I make but a few observations
on this subject because in most cases the C.
law governs -

The Majority of the owners of interest
direct the course and destination of the Ship - But
this cannot be done without the privity of the
Minority. i.e. they must be present - They cannot
be compelled to unite in the voyage -

Where the Majority put out the
Ship and the Minority do nothing the Minority
may come in for their share of the dividends but
then they become liable for their proportion of the
expenses. But the Majority may go into Admiralty
Court and give Bond to secure the loss, if any,
to the Minority - Where Minority have nothing

1 Carth. 26 -
1 Show 233 -
2 Vern 643 -

vid supra.
2 Show 283

Lex Mercatoria

Partnership

6 Mod: 162
2 Roy. 1285
Hardres: 476

to do with the profits. The Men only, two can compel the Majority to give Bonds.

Malay 221
1 Bentin 227.

If two joint owners send out a ship without the consent of a third, and there is nothing done - and ship is lost. Third person loses his share.

1 Vern 465

When the account of the ship is to be settled there is done by Majority of Owners.

Law of Partnership

3 B. & Ald 102
3 B. & Ald 102
1 H. Blac 37
2 Hobt: 247
2 Bla Rep. 998

Men are always partners in trade and liable as such. Where they have a share in the profit or loss - Dormant or no - If a man for the sake of giving credit to his friend lets him use his name, he is liable as partner.

By C. L. when people are joint owners of property under certain circumstances they are joint tenants - and the Jus accrescendi governs. But partners are tenants in Common. The Jus accr. exists not at all in the law Merch. The property of the deceased partner vests in his representatives.

If there is any thing undone that must be done in the name of the surviving partner to bind the liability of being

Ley Mercatoria. Partnership

and attaches to the survivor partner. But the survivor partner when he sues and recovers must account to the Representative of the dead partner to that when he is sued and found goes as his own he may retain &c. —

Where there is a debt due to the firm the Executor may receive, pay and give receipt as well as the survivor. So he has the power of release &c. in short all the rights the survivor has except the right of being sued. —

Where there is a recovery vs. the survivor and execution is returned no est you may sue the Executor. The mode is by process in Chy in England. — — —

As Bare partners in trade and as long as they are not Bankrupts their property is liable to their creditors & owners &c. a private debt &c. may recover out the private property of A. or out of the property of the firm as long as they are not bankrupt by —

In case of insolvency &c. &c. other rules. Their debts are to be settled on their principle. Their joint property goes to pay the Company debts. and the private estates

1 Leigh 166
1 Show: 283
3 T. R. 553
1 Salk: 444

Comb: 474

Ley Mercantile. Partnership

of the partners to pay their respective debts
after leaving from the private debts the surplus
goes to pay off the Company Debts —

1 Burr: 366
2 Vern: 279.
1 Show: 173
5 Ves Jun 871

Each partner is not bound at all
for the private debts of his partner —

Where there is a surplus of the
property and a deficit of the private property
the surplus is divided between the partners —

How do you get at any where
you come to levy the execution on the property
Here there is a difficulty — One way has been to
sell the moiety of the property for instance
and then the purchasers and the other
partner become tenants in Common — Another
method has been to levy and sell both — and
remit half the Money to the other partner —
So all these modes the Judge thinks there are objec-
tions and he knows no way which can be
devised free from objections — The least objec-
tionable mode the Judge thinks is to sell a
moiety — and if it does not fetch its worth
it is the ill luck of the debtor —

Chan: 871
1 Peters
1 B. & Ms 681
2 H Bla 247

There has an attempt been made
to break in upon the principle that partners
are liable for debts of the concern when they
agree only to share the profits but each
to bear his own loss. This as yet is not the law

Lex Mercatoria. Partnership —

as to their persons —

How is the Executor to bring the surviving partner to account before there is a balance struck? you must bring an action of Account or else sue for a Bill in Eq.

If one of several partners contracts with out disclosing the partnership & when the other party i.e. seller supposes he buys them for his own private use — & is a partnership debt when it can be proved that the Company had the benefit of the purchase — 1 P. Wms. 705 — 00 = 727 — 1 Vern. 228 — 2 Ch. Ca. 45

When the Contract is made for things without the scope of the partnership and one contracts and serves the partnership as secretly — the partnership is not liable as where one partner purchases Lands —

But where one partner purchases things usually bought by the Comy and they are for his own use and he serves the Comy they are liable —

But when one partner purchases a coach and serves the Company they are not liable — — —

April 15th

A Contract made by one of the partners neither the scope of the partnership binds the rest —

Factors

and indeed after dissolution of partnership without notice the partners must be bound by the Contract of them of them - - -
What is notice? This is the only question on this subject. The common way of giving notice is to advertise in Newspapers - and in public places. And after all there may be some persons who do not know it. But then you must resort to a presumption that he did know it. But then depends on circumstances after all -

Cowp. 449
1 Salk. 292
Bl. R. 993

The Contract between partners for one to bind upon himself the part of others has no effect upon third persons -

Property which is not a subject of mercantile transaction - cannot be devised cannot be conveyed to a Company. It must be conveyed to the Individuals. A Conveyance to P. & Company is to P. & alone -

Factors -

A Factor is a person employed by one merchant to do business for him on another he acts under a commission - and by them he must strictly abide -

When a factor sells for less than he has authority - the employer holds all the

Ley Mercatoria. Factors

factor had no authority - for there is a matter
between the factor and his principal -

There are two kinds of Commissions viz: 202
General and Special - The words of a general
commission are to buy sell and conduct
with as his own, This vests great power in
the factor -

A Special commission is to sell
and dispose, without words of discretion -
as in the case above. These words do not give
permission to sell and dispose on credit - 10 Mod 164
if he does he becomes answerable to the 2 Vern 638
Merchd - He must receive at the time of the Malloy 493
delivery the recompense - 2 Mod 101

Formerly the remedy between
Merchd and Factor was an action of Account
but that has gone out of use - and they now
resort to Chy. which has more power to call
for discovery -

It is common for one factor to act
for several Merchts who have no connection
with each other - These frequently run great
risks with they have no connections - as -
where they send a certain quantity of goods
and factor sells them on credit to one

Factors—

man and he fails— there must be a demand of the agent which purchaser paid at the sale—

Where he has no power to sell on credit— and purchaser and factor both become bankrupt— there must be a division. One cannot by due diligence as at Com law get the whole— This division of loss runs thro the whole Mercantile law—

Suppose that factor demands a Bill of Exchange upon three Merchts and it is accepted by one of them— does this bind the others— The Ct held that they were not bound— because an acceptance by a Mercht binds no body but himself— The Judge thinks this decision correct. ——

Dall. 126 Lawyers Mag—

The requisitions of a factor are fidelity, diligence and honesty.

Co Litt. 89— Malloy 495— 1. Co Rep: 84

Contra. The purchaser must conduct fairly— as where goods not sound are sold—

Exc 5: 416 Topham 113

Where a factor runs goods and thus avoids duties— and yet charges them in account with the Mercht. it has been decided that they are entitled to these charges— the Judge thinks this a most

Exc Bac 265 Bac Abr— Tit: factor

Lex Mercatoria, Factors -

abominable decision - and hopes never to see such decision in this Country -

The sale by factor must necessarily bind the principal - let his authority be what it will - But a factor cannot pledge the goods for his own debts - and then does not vest the property in the lender of pledgee - 7 T R

Where a factor has authority to buy so much and he buys more - the principal is bound - People cannot examine into the extent of authority - 2 Burr 665

Where factor exceeds his authority he is not only liable for damages but he forfeits his wages besides - in this differs from the Com Law where wages would be due notwithstanding - 2 Vern 339 - 2 Vern 339 - Burr 489 -

Neglect of duty makes a man as liable as a treacherous person -

Where factor is publickly known as such - the principal may safely ask people not to pay to the factor - and then whether he takes the notes Bonds &c in his own name or in that of his principal - if they

Ley Mercatoria. Factors

pay. they do it at their own risk. and must pay it over again -

When factors do not deal as such. notification does not effect such as deal with them -

Burr 189 These factors have a lien upon the goods in their hands not only for their commissions - but for the balance of her account -

When factor is Merch. and his interest clashes with that of his principal. the law obliges him to take more care of his principal than himself -

If the factor has property of his principal in his hands and dies or becomes bankrupt - his Exor - or assigns have nothing to do with them - they belong to the principal at once. Where they properly cannot be 2 Burr 178 1 Salk 160 ascertained the property must rest in the Exor or assigns - and he is liable over to the Merch. -

Stoppage in transitu -

This is a right Merch. have of stoppage

after they have sold them - There can be nothing more diverse from the Com Law than this - for there the property vests immediately on the sale - This transitu business is a creature of the Mercantile law altogether -

Here goods are packed up and are charged upon the Boats - at Com Law then would vest the property in the Vendee but not so in Mercl Law -

So too they may be stopped in transitu - where they are delivered to a Carman to be carried off -

But you are liable for all the injury you cause - as if the Vendee is no Bankrupt but in solvent circumstances -

This goes only on the ground to prevent frauds on the Merchant -

But where does this system? - If the goods are actually delivered and have got into his possession or that of his Agent the transitus ends - As soon as they are on board the vessel the transitus ends

If a Bill of lading has been consigned 2 Wils 133 Ld R

Lex Mercatoria

Transitu - Sailors

over - Their rights not alt. as long the goods are en transitu -

Where this Bill of Lading has been assigned over to a third person bona fide purchasers this vests the property in assignee

2 T.R. 63
5 D.O. 693 - It has been decided that there is no stoppage in transitu - once it vests the property -

Sailors -

Their contracts are affected by the law Merchant -

Where they are not entitled to their wages till they arrive at the port of delivery, unless expressly agreed to the contrary - The reason of the rule is this - that if vessel is lost before she reaches port of delivery their wages are lost -

2 Roll Ab 139
2 Roll Ab 639.
2 Vol Ca 666
2 Vern: 728 -
1 Salk: 129.
2 Salk: 179 -
2 Burr 1344
2 Roll Ab 576 -

Where they agree not to call for their wages till their return - and vessel is lost on her return - his wages on the outward bound are due -

So too where he agrees to wait till the vessel gets back and she is lost -

Seamen are entitled to interest on their wages from the time they are due

Lex Mercatoria.

Seamen—

The Seamen may lose their wages by making disturbance on board—i.e by resisting by the authority on Board—

So it is said that they may be confined and put on shore for disturbance. This however must be governed by reason—

It is said in some Books if they make disturbance the Capt may confine them or put them on shore. But if they shd they lose their wages—unless they reasonably expect to say the Barbs— Malloy—

So they lose their wages by wilful absence—or when they leave the vessel before Cargo is discharged— 15 May 1872 17 Feb. 79—

If a Seaman is disabled by accident after sailing he is entitled to the whole wages of the Voyage— This as a mere maritime provision for Sailors— 2 Pet. Bla 606—

Pleas and Pleadings. by Mr Gould.-

Pleadings are defined to be the mutual al- 3 Bla: 296. 293
tercations between the Pltff and Deft in a suit first into legal 10 Co: 132.
form and set down in writing. Anciently in Engd all
pleadings were oral. The Counsel delivered his plea vivæ
voce and then it was reduced to writing by a Clerk or pro-
thonotary. Hence they are frequently called in Norman French
parol. thus it is spoken of the parols demurring.
In Great Britain from the time of William the Conquer or
until the 36th Edwd 3d pleadings were in Norman french
which is properly the language of the law. From this time
till the fourth of Geo: 2nd they were in Latin and by a Stat 3 Bl: 317
of that year they were reduced to English in which language Laws 28, 29.
they have ever since continued.
The English Reports till the time of Car: II were in Norman fren:
because the pleadings were in that language tho the greater
part of them are now translated.
All pleadings in Civil actions in Engd and in this Country
are required to be put in writing.
In strictness then, pleading is nothing more than setting forth
upon the Record such facts as constitute the ground of the 3 T.R. 159
Pltffs demand or claim on one hand or of the Defts defence Doug 278.
on the other. This is the precise definition of pleading.
Lord Mansfield has observed that the substantial rules of
pleading are founded in the strongest sense and in the
soundest and closest logic. & Littleton that it is the most 1 Burr: 319
honourable part of the profession.
The great object of pleadings is to present the claim of the
Pltff and the defence of the Deft in such a manner as will
most commodiously admit of an easy and impartial trial
so as to bring the claim and defence on both sides to some

1 Burr. 319

precise and definite point. Without a system of rules in pleading there would be no uniformity in the administration of Justice.

Pleading is strictly a syllogistic process. Every good declaration and every good plea contains the elements of a good syllogism. A declaration is not a syllogism in form but it is in substance one. Thus to exemplify the proposition, Suppose there is a declaration in Trespass quare clausum fregit. The Plff is the pleader. The syllogism is this. Major proposition, against him who has forcibly entered upon my land, I have a right by law to recover damages. Minor proposition, The Deft has forcibly entered upon my land. Conclusion, therefore agt. him I have a right by law to recover damages. The Major proposition contains the legal principle on which the Plff founds his claim. The Minor contains the facts to which the legal principle is to be applied in the particular case. The conclusion is an inference of law from the application of the principle to the matter of fact stated. These propositions then must all be capable of being denied. The Deft is at liberty to deny the legal principle, the facts contained in the Minor proposition or the Conclusion. The rules of law have settled how they are to be denied. The first is to be denied regularly by an issue in law called a Demurrer. The operation of a Demurrer is to admit the matter of fact so far as it is properly stated. but to deny the sufficiency of it in law in favour of the pleader. The Minor proposition is denied by an issue in fact which may be either a general or a special issue. If both propositions are admitted or not denied, (other arguments to an objection) the conclusion can no other

wise be answered than by alledging new matter and this must be done by a special plea in Bar-. The cannot traverse the conclusion. He may deny it by a special plea in Bar as a Release for instance- The plea of a Release presupposes the Major and Minor proposition to be correct but avoids the conclusion by something new. This plea also contains the elements of a good Syllogism. It is as follows. If he whom action I have forcibly entered release the Trespass- his right to recover damages as me has ceased. The Pltff has released the trespass complained of. therefore his right to recover damages against me has ceased- Here the Pltff again must be at liberty to deny either of the propositions. If he would deny the first he must demur, because it denies the legal principle: if the second he will deny that he ever released- If he denies neither he can avoid the Conclusion only by new matter contained in a special Replication- as if the Release was obtained by fraud- he must state the facts. This view of the general principles of pleading may be pursued from the 4th to the 10th Section.

1st The Writ-

The first stage in a suit is in England the Writ. This is a Mandatory letter directed to the Sheriff and issued by proper authority to compel the appearance of the Deft- The suit is regularly and for most purposes commenced from the issuing of the writ. but in B. R. it is not commenced until the filing of the Bill- because the Bill in this Court is analogous to a Bill in Chancery Hence it is considered the original commencement of a suit- In Court the Declaration and Writ issue together In strict ness the writ is the foundation of the suit here as well as in

8 Bla: 273-
Comyn: 454
8 T. R. 4
1 Wils: 147
1 Bac: 491

as before

Englaind. But the first stage of the suit here is as much the declaration as the Writ. The suit is not considered as commenced here to all intents and purposes until service has been made upon the Defdt. for it has been decided by our supreme Court upon a plea of tender where the suit stood and no service made before tender that it was good tho he did not tender the costs - For many purposes however the suit is commenced from the issuing of the writ because the cause of action must exist at the date of the Writ. As if a writ issue to day upon a Bond due tomorrow and not served till the next day, the Pltff cannot recover -

1 Root 486

2 Declaration or Count -

The first stage of pleadings is the declaration or Count. This contains a Statement of the grounds upon which the Pltff founds his recovery. The Writ is not a part of the pleadings - All the Statement it contains is made by the Count. There are here no material allegations or altercations -

1 Saunders: 75
1 Mod: 17a
Plowd: 84
3 Bla: 293.

The Words declaration and Count have been used as synonimous. but a distinction has lately obtained. If there are two or more counts or distinct statements in the Cause each distinct statement is called a Count and they all together the declaration. Yet when there is but one Count they are synonimous -

The Count or declaration is but an explication or exposition of the original writ. The writ itself must name the Cause of the suit and the parties but it states it very briefly. It does not state the special facts out of which the Cause arises. These are reserved for the Count. We have no concern with what is called an Ac etiam, or Count. This is a clause inserted in the Bill or B. R

3 Bla: 293
4 Bac 8.
5 Com: 18.

for the purpose of giving that Court jurisdiction over matters purely civil - This Court has original jurisdiction of no other civil causes except torts - for which a fine is due to the King - But when once the Deft is in the Custody of the Marshal of the Court he may be charged with any personal civil action whatsoever - Of real actions they had no cognizance in that way. The Writ then may contain a clause charging him with a Tort as e.g. Trespass and then "&c" etiam " with debt also. The first cause of action gives the Court jurisdiction over the person and then the "&c etiam" enables the Plff to declare vs him in the personal civil suit -

The pleadings include the Court in the largest sense of the Term. In the limited sense of the Term. they embrace those allegations only which succeed the Count and they denote those allegations which the Deft makes by way of defence to the action and those which the Plff makes to fortify the Count - 4 Bac. A. 6. 8. 3 Bla: 299 -

The first stage of the pleadings then in the limited sense of the words is the Defts plea. The pleas on the Defts part are divided into two kinds viz 1st Dilatory pleas and 2nd pleas to the action. 1st. of Dilatory pleas. These are such as tend to delay the suit by questioning the Mode in which the remedy is sought rather than by questioning the cause of the action itself - 3 Bla: 301 3 Bla: 301

This first class of the Defts pleas admits of a sub-division According to Blackstone they are of three kinds, viz 1st Pleas to Jurisdiction 2 Pleas to the disability of the Plaintiff 3rd Pleas in Abatement - These three classes comprehend the whole of dilatory pleas A different division is made by other writers - The propriety of this division

is questioned by Jaines. It is however immaterial as they embrace all descriptions of dilatory pleas.
1st Pleas to the disability are often called pleas in abatement and so are pleas to the jurisdiction sometimes. Abatement has been considered as a generical term including all dilatory pleas whatsoever. But improperly. The form of this is distinct from either of the others. The object and effect are different from either of the others. therefore it is illogical and improper to call a plea
1 Bac: 35 to the Jurisdiction or disability of the Pltff a plea in abatement.
Pleas of the second kind are
2 Pleas to the action. A plea to the action is an answer to the merits of the Pltffs complaint, and denies the cause of action entirely. A plea to the action may deny the Pltffs right of recovering in three ways. either 1st By denying the Pltffs allegations 2nd by confessing and avoiding them. or 3rd by matter of Estoppel. this denies the Pltffs right to make the averments. This is generally considered as an avoidance of the Pltffs allegations but it is not strictly so. These pleas are of
3 B. C. 303. S. C. 2 Saunders 87 & 115 130. 1 Lev 8 B. C. 305 two kinds. 1st The general issue when the allegations are denied. 2nd by a special plea in Bar where there is matter of avoidance: 3rd by estoppel by a plea in Bar to be sure. but not by matter of avoidance.
There is another mode of denying the Pltffs right of recovery that he cannot by another plea. The way in which he may do it is by demurrer. This is not strict properly a plea tho it is sometimes called one. It is not a plea for it denies no matter of fact. nor alledges any new matter. It only

says "I am not bound to plead". The form also shews this. Accordingly to the form in Engd the Deft after saying the Pltffs declaration is not sufficient proceeds to say for want of such sufficient matter the Deft is not bound to make any answer thereto. This is I think clearly a proper view of a demurrer - This has been classed however with pleas & the action for admitting it to be a plea it is not a plea to the action. for a demurrer may be taken as well to any other part of the pleadings as to the declaration. A demurrer then is a mode of denying the Pltffs right of recovery, but not a mode of denial by plea. Thus far of the general view of pleading - I shall lay down some general rules relating to pleadings in general.

4 Bac 129. 30
1 Mod 72 2a.
5 Mod 132

In all pleadings two things are necessary. The first and most important is, that the substance of the plea be sufficient. or in other words, the matter alleged must be sufficient of itself, in a second, that this matter or substance be delivered and expressed according to the forms of law. If either of these is omitted the pleadings are bad. if the former it is bad in substance. if the latter it is bad in form - There are different ways of taking advantage of the omissions. They are both good causes of demurrer. Omitting the first is good cause of general demurrer. the last of special demurrer.

Hobt 164

In all pleadings it is necessary to state facts only as as often as may, conclusions from facts: but it is never necessary to state conclusions of Law - True, particular laws and customs are pleaded when the court cannot ex officio take notice of them - but the general rule refers to the general laws - Customs - then which are pleaded are mere exceptions to the general rule The conclusion from a fact as a conclusion from a fact stated in the declaration. It is not then a rule pleaded independent act of itself for it is inferred from

S.J.R. 90.
Doug: 159.
Lawes: 46.

a fact expressed in the declaration. This is a conclusion from facts stated.

Rule 2d. Another general rule in all pleadings is that every plea should be direct and argumentative, not by way of recital. The averment of every thing material must be positive and this general rule requires one thing, that things immaterial need not be directly stated, as mere matter of inducement.

But no fact however important it may be, need be stated by way of direct positive averment. If it cannot be distinctly traversed by the rules of pleading. By the rule last mentioned is meant that the party pleading should state the principal fact itself direct and in positive terms: not the grounds from which he would infer the principal facts. This he cannot do under a Whereas, but must aver it directly and precisely. Thus if A. in a plaint and Battery should declare against B. that Whereas &c. it would be ill. for the general issue would be as much as Whereas he did not &c., and a verdict cannot cure this verdict. it is substantial. This is stating the material thing indirectly.

Dond: 128
1 Mod: 303.
S.J.R. 458.
Lawes: 75, 131, 24
4 Mac: 97

But it has been held and seems now established that an averment following the words "Quia," "Licet," "Prout quod," are severally sufficient notwithstanding the rule above laid down.

1 Saund: 117.
Moore,
1 Fev: 194
Lawes: 67, 69.

According to this rule then, it is apparent, it is not sufficient for the party pleading to state the mere evidence of the principal fact to be established. This amounts to nothing better than argumentative pleading. Thus in Indeb: assp: if the Plff should state that the Deft became indebted &c. and became liable to pay him: the Action would be insufficient. because the indebtedness and

consequent liability are the mere evidence of the implied promise. The indebtedness of the deft and a consequent and a consequent liability is all that is necessary for the Plff to prove. consequently they are the evidence of the promise. So also in a note of hand. he only describes the instrument which is merely the evidence of the promise. This Count is bad and has been so holden by our Courts on a Writ of Error. So in Grover. if no conversion (which is the gist of the action) is alleged. the Count would be bad. for demand and refusal are only evidence of a conversion. They are not the conversion itself—

Suppose one states in his Count that P.S. will swear truly that the deft did promise to pay the Plff at such a time. such a sum of money. this is evidently bad. but it is not more so than the other on point of principle. for the oath of P.S. is stated. which is the evidence of the promise.

Cro. J. 385
2 Roll: 78.
1 Saund: 274 note

3d. Rule. Another general rule in all pleadings is that each party admits as much of his adversarys allegations as he does not deny. Allowing a right to deny if he does not he impliedly admits them. This rule holds thro all the pleadings. Each parties plea is to be construed most strongly against himself. If therefore two constructions may be put upon a plea one in favour of, and the other against the party pleading, that construction which operates against him must be adopted, since it is to be presumed that each party will make the best of his own case. If it were not so. chicanery would prevail to prevent the course of Justice. This rule holds in all analagous cases as in written Contracts—

1 Bac 273
1 Mod: 303.
Hobt: 234 Gwin
Plowd: 202.
Lawes: 52.
Latch: 186—

Pleas and Pleadings—

5th Rule. Another general rule is, that in pleading traversable facts it is in general necessary for the party pleading to allege the time and place. Some time must always be stated. yet he is not bound to prove a time except when otherwise it would work a variance. A place must be laid for the sake of a venue. So in transitory actions some place must be stated. because according to the strict rule of the Com. law the action must be brot in the very county where the action arose. This rule of Com. law is varied from. by statute & ordinarily this however mere form. Here it usually held so. no contract written or Bond executed abroad could be sued in this County. In Eng they evade the rule in this way. If a Bond given in New York be sued upon in England they state New York to be in the U. S. & aver it in the parish of St Mary le Bow in the Ward of Cheap and this fact is not traversable. Lawes 57 &—

In actions brought to recover personal chattels, or for injuries done to them. it is a general rule, it is necessary that the Number quantity and price of them should be stated. but it is never necessary to state the truth in these particulars except where a mistake in either of them would work a variance—As in Trespass he must state that Deft took a certain number of horses and if he can prove he has taken but one he will recover. These are regularly but matters of form except where a variance would be made. Thus if the Plff should declare that the Deft made a promissory note in which he bound himself to pay 100£ when in fact he bound himself to pay only 90£ this mistake would be fatal. The terms

Pleas and Pleadings-

of a Contract must be stated exactly as they are proved. Lawes 69
In torts there is no matter of variance -
5th Rule. It is also a general rule that surplusage does not vitiate the pleadings - Utile per inutile non vitiatur 2 East 333 - Lawes: 63 - Bro Cas 549 1 Photh 363 -
is a maxim of the law. but duble repugnancy in a material point will vitiate any plea -
By surplusage is meant matter wholly unnecessary, or in other words it is where a party having alledged sufficient for his cause proceeds to allege dule further something foreign to his plea - Now if the party state things neither good nor bad, they cannot injure the plea - 46 : 42 -
Repugnancy is a self contradiction in the pleadings and consists of two or more averments of the party, being inconsistent with each other -
It is said in our Books that every thing must be pleaded according to its legal operation, and not as the case may be - the direct matter of fact - I have thought says Gould this rule was wrongly expressed and have found an authority in support of my position. Thus 1 Bac 100 1 Photh 993 & 2004 Comyn 599 - Doug 642. Co Litt: 238 b. 1 D.R. 446 -
it is said if one joint tenant should enfeoff another this must be pleaded as a Release not as a feoffment, since one joint tenant cannot enfeoff another - So if a grant is made by a Tenant for life to the Reversioner this must be pleaded as a surrender because it can not enure as a grant, or if one should covenant never to sue his debtor, the proper mode of pleading this is as a Release or discharge, not as a Covenant from all these things may be seen pleaded and it is the most proper way - but it is not absolutely

necessary that it should be so pleaded — As in the case of the joint tenant the law considers the feoffment as a release consequently the evidence of a feoffment will support the averment of a Release. Might not therefore the feoffment be pleaded as a feoffment? Cannot the Court discover it when on the Record as well as when of the Record? 1 Sm 2nd Hen: Bla. the rule is Quia Quoad ea as it ought to be by Lustia Kilmot. It may be pleaded as a direct matter of fact or according to its legal operation.

1 Prest: 303-8. 7 Co: 40- 9 Co 54 a & b 11 Co: 25- 2 New Rep. 77- 2 Root: 247 2 Bac Abr. 7-

That which appears on the Record need not be averred. This is another general rule. However material the fact may be. if it appears on the Record the pleader need not aver it — and if it appears by necessary implication it need not be averred —

As if the fact appears by the other partys own showing it is entirely useless to plead except for the purpose of shewing some fact which does not appear. —

And all necessary circumstances implied in the facts stated need not be specifically alledged. If the averment of one fact implies the existence of another, the latter need not be avered if it only furnishes evidence of another fact. this latter if material ought to be specifically alledged. This in pleading a feoffment. it is not necessary to aver that livery of seisin was given upon the feoffment. for the word feoffment ex vi terminis implies livery of seisin. There are some cases given that this would be ill on demurrer and is cured only by verdict.

1 Prest 303 b Laws: 26.

Whatever is admitted by the parties cannot be contradicted by Jury in their verdict. Neither of the

parties can retract what he has pleaded though the Court in its discretion may allow a party to correct an error in his plea. The province of the Jury is to pass only those facts which are averred on one side and disputed on the other or in other words those facts about which the parties dispute or in which they do not agree - General estates in fee simple may be generally alleged i.e. the party is not bound to show how and when it commenced but in an estate less than a fee simple he must allege how and when it commenced and was created. The reason of this distinction is that estates in fee simple may commence by a mere matter of fact. A particular estate always commences in some manner which involves matter of law -

1 Bac: 2 - Bull. N.P. 289 Lawes 48 -

Lawes 47 1 Roll 832 3 Wils: 72

There is a great diversity between immaterial and impertinent averments. An immaterial averment is one which though unnecessary is immediately to the point in question and so that omitting to prove it would occasion a variance. An impertinent averment is one altogether foreign and not proving which would not work a variance - The Criterion to determine between them is

5 Esp Rep 31.3. 2 Bla Rep 1104 Doug 640. Bristow v Wright 3 T.R. 446 2 East 469. 446 B. N.P. 5 2 McNally on Ev. 501. 513 -

In a note by the Editor of a late Edition of Douglas he says the necessity of proving immaterial averments is confined to cases of Records and Written Contracts

but Mr Gould says he thinks it is confined to Records and express Contracts. et variance is as preventable of a parol Contract as of a written one - and variance is the foundation of the rule -

Tho the rule is as above it is never required of him to prove impertinent allegations, i.e. such as are foreign to the subject of pleading. As if the Plff shall declare that the Deft entered into a Bond and at the same time he wore a red Coat. the latter is an impertinent averment and he is not bound to prove it

If the Decln or plea or any other pleading on either part wants necessary form or omits the circumstance of time place &c it is regularly aided by the adverse party pleading over instead of specially demurring i.e. if he neglects to demur and pleads over he can not take advantage of the defect afterwards for when the pleading is faulty in no other respect than this advantage can be taken of it only by special demurrer But when the pleading is defective in substance it is incurable - Thus if the fault be duplicity the Deft pleads the general issue - the Deft can not take advantage of the duplicity - So where there is a party who pleads a record or deed and omits to make a profert of it this if the adverse party pleads over instead of demurring the fault is aided. Indeed it is a general rule that a defect merely formal is aided by the partys pleading over. The principle on which this depends is that of a waiver. if in such case the

7 Co 25 a
8 Co: 120 -
1 Prest: 303
Carth: 64
Salk 519 -
4 Bac: 2 -

2 Vent: 222

adverse party does not take advantage of the defect in the manner pointed out by law he waives all the advantage he might have taken to the informality.

If the pleading on one side is ever so materially affecting a material fact stated by the other party avers himself that material fact omitted by his adverse party. the pleadings will be aided. Thus if the plea in bar avers a material fact omitted in the Declaration the Narr is aided by it. So if the Replication avers a material fact omitted in the plea in bar the plea in bar will be good. for in either case there will appear upon the whole record a cause of action when the defect is in the Narr. And although it does not appear in the proper place or is pleaded by the proper parties. still the defect is cured. Thus the Pltff charges the Deft with carrying away a Quantum hamam not stating he he had even the possession of it or the right of property in it. The Deft in his plea in bar admits he took the goods the property of the Pltff and then proceeds to justify it. Thus cured the Narr which would otherwise have been bad on demurrer.

5 Bac 197
1 Ld R 184
Com. Dig. Pleader
C. 86. & 87. or 237

Any new matter alledged in any stage of the proceedings after the Narr must conclude with a verification, the form of which is thus "and this he is ready to verify" The reason why this must be done is that a verification is the established mode or form of leaving the pleadings open to further reply. for you will observe from what has been said that the Deft or Pltff has three ways of meeting new matter. first by denying it, secondly by confessing and avoiding it, and thirdly by demurring to it. But the party has closed the pleadings the new matter could

3 B.C. 309.a
1 Saunds 103. in note -
Comyns 575-
2 Burr 772
Doug 58-

not be denied which is contrary to the rules of pleading because when the party advances new matter he cannot make an issue and compel the other party to join him exactly. It is true the verification is the established form yet it is a thing absolutely necessary, that the party may meet the allegations of his adversary as he pleases. There is an exception to this rule by the Stat of 5 Geo 2nd in case of Bankruptcy - but this is an anomoly and ought to be considered a Monster out the Com law.

I have anticipated the rule that in every stage of the proceedings each party may meet the allegations of his adversary in one of three ways viz. 1st by denying them and pleading the general issue - 2ndly By confessing and avoiding them by some new matter and 3dly by demurring to them -

Lawes 148
11 150/158.
3 B.C. 309.10

This may be done in all the pleadings till a proper issue is tendered and then the other party is bound to join in the issue. He has no longer an election. If then the last pleads in bar - the Pltff may deny the fact stated there or he may confess and avoid it. or he may demur to it. He who pleads new matter then must conclude with an averment and not to the country. The pleadings are in the following order The first plea is on the part of the Pltff and is called the Bar. 2nd the last answer as a Special plea in bar. 3rd the Replication of the Pltff. 4th the Rejoinder of the last. 5th the Surrejoinder of the Pltff. 6th the Rebutter of the last. and 7th the Surrebutter of the Pltff -

Pleas and Pleadings

No chain of special pleading is carried further than a Surrebutter. Why in the nature of things it cannot be done is not evident.

One thing material is to be observed respecting the succession of pleadings. In every successive stage of the pleadings the Pleader on each side must support what he has before alleged in his own favour. The plea in Bar is to destroy the Barr. The proper office of the Replication is so to answer the plea in Bar as to fortify the Barr: and so on through all the pleadings and if this is not the case the party pleading is guilty of a variance or departure in pleading.

3 B. & C. 310
2 Bac 6
Plowd 7, 6
1 Mod 30 & a
2 Lord 1409
Com. Dig. 123

In concluding these general rules I would observe that the Judgt given by the Court is always rendered upon the whole Record. So that he who upon the face of the whole Record taken together appears entitled to judgt must have it. And the rule is the Court are to give Judgt upon the first substantial defect in the pleadings. Thus if the Barr should be bad, and the plea in bar bad and the Pltff should demur to the plea in Bar as bad the Court would look to the first defect and they would find it in the Barr the bad plea in Bar is good enough for a bad Barr for the latt need not have made any answer to the Barr. Suppose the Barr good the plea in bar bad and the Replication bad and then the last demurs here the first error is in the plea in bar. Therefore judgt must be rendered for the Pltff because a bad Replication is good enough for a bad plea in bar. This rule may be applied thro all the successive stages of the pleadings.

Hobt 199
Do 54 a 56 b
8 Co: 120 b
Do 138 b.
9 Co: 110
Salk: 173

Pleas and pleadings.

These are all the general rules I propose to lay down. It now becomes necessary to attend to the several branches of pleading in their order.

The Declaration — or Narr.

And in prima I shall speak of the Narr which is the first stage in the Pleadings. The Narr must shew all that is necessary or essential to the Pltffs right of action. This is the most general rule. The Narr contains the whole foundation of the Pltffs claim. Now unless the claim is stated in the Narr it cannot be supported. Indeed it is said to be a reason for this rule that the Pltff cannot prove any material fact not alleged. This is not a reason but I think it rather a consequence of the rule. The reason is that the Pltff cannot recover unless he shews a right of recovery. The evidence of this right is contained only in the Narr. The Pltff cant prove a right of action unless he has Narr.

1 Inst: 303 a
Plowden 554
Hobt: 199
Lawes 68
4 Bac Abr 6
Do: 13 —

And as on the other hand the Pltff cannot recover unless the Narr shews all that is essential to his right of recovery. so neither if the Narr (keeping other rules sufficient) discovers any facts which shews he has not a right of recovery, he cannot in portion recover. For the same reason also if the Narr discloses any facts which shew that at the commencement of the Suit the right of action was not consummated he cant recover.

Bro C: 325
Bro Pac 574
Comyns: 554
Doug 61
7 T. Rep 4 —

Thus if the Pltff shoud declare on a Bond to day and in his Narr should shew that the Bond was

not due till tomorrow he could not recover upon it since his cause of action must exist at the date of the Writ. And the Plea is so radically defective that it cannot be cured in any manner.

Yet it is very improper to say that the writ abates in such case, for that is an inappropriate term applying particularly to another part of the Pleadings. The rule mentioned above admits of an exception. The rule is no man can recover in an action on a contract before the time of performing the Contract has elapsed. The exception is this, viz. where one party is bound to perform a Contract in future and disables himself to perform it before the time of performance arrives, he may be sued immediately after the act of disability. Thus if A covenants to convey Lands to B. within 6 Months. and at the end of one month conveys the specific lands to a third person for a year or in fee he may be sued before the 6 Months have expired. He may to be sure repurchase them before the end of the 6 months, but this is not to be presumed.

So if a Lessor for years covenants that he will at the end of his term leave the Timber trees standing, and thus is the strict time of performance of the Cont. 5 Co. 20. 21.
once if he cuts them down before the end of the Term he may be sued immediately.

The omission in the Plea of any thing which is the great ground or substance of the action is an incurable defect.

Pleas and pleadings -

The gist of the action is the substance of the claim. the essence of the right to recover. it is that without which there is no cause of action. And the Pltf may omit the gist of the action without omitting any material fact.

A. will be entitled to a right of recovery vs B. by doing a precedent act himself. After performance he sues without averring performance on his part, here is no cause of action for though he has stated some material facts viz a Contract and that he has never been paid. but still the material fact of performance has been omitted. and this is sufficient to destroy the Pltf.

Again upon the principles of the Com Law if a boy has done an injury to another persons property the owner is liable if he knew before hand that the boy was addicted to this species of mischief.

5 Mod 305 - 4 Bac & - Suppose then the action is brot vs the owner of the boy stating every thing except the scienter, there is no cause of action. A material fact is omitted which is the gist of the action and this is enough - and in case of such an omission as this the defect is incurable. The Deft may demur and it will be sufficient. or if he pleads to issue and there is a verdict for the Pltff, he may move in arrest of judgt or have it reversed on a Writ of Error. A defect going to the Gist of the action is incurable, & verdict will not cure it

3 B. C. 395 - Doug 658 - 1 S. Rep. 192 -

Matter of inducement and matter of aggravation are not the gist of the action. A Narr may consist of inducement aggravation and substance.
The Inducement consists of such subject matter as is merely introductory to the principal fact or cause of action. and is always inserted for the purpose of elucidating and explaining how the cause of action arose.
Matter of aggravation is that which goes to shew with what enormity or under what circumstances of outrage or hardship the wrong complained of was committed. Lawes 66. 9 Lawes 70
There are rules applying to these matters which will be given hereafter, but I would here observe that in laying inducement and matter of aggravation the law does not require the same strictness in form nor the same certainty in description as in stating the cause or ground of action.

In all actions the Narr must contain what is called certainty. This certainty is as to parties time - place - and subject matter. All these parties ought must be so stated as to be intelligible that the party may accept his defence to the real claim of the Plff. This certainty relates chiefly to the mode of making averments and the meaning is that the allegations should not be loose vague and ambiguous for three reasons. 1st that the Deft may know how and what to answer, 2ndly that a regular issue may be formed Plowd 64. 122 1 Prest: 303 a 6 co Eliz: 78. 5 Bl. Rep. 352.

and joined, and 3rdly that the Court may know how to render judgment.

And it has been decided that the words "said," "aforesaid," &c do not import sufficient certainty, when there are two antecedent subjects to which they are referable, for these words are words of reference. Thus if two Counties have been named and the Pleader proceeds to say the said County, or "the County aforesaid," this wants certainty. This holds true of the subject matter and parties also. Thus in an Indictment on which S.S. was indicted for Burglary and in the recital part of the Plea another S.S. was named and then the Plea proceeds to state that the "said," or "aforesaid," S.S. &c this was holden to be uncertain. You might say in the first or last aforesaid County. At any rate you must use words of more particularity.

2 East 64 or 6. 2 D May 888 & 3. Rep: 178.

But tho the Rules contain certainty, the rules are not now near so strict, as formerly. As to the subject matter the rule with respect to a description of it, was very strict but the decisions have not been uniform and many cases are irreconcileable. In certain Kinds of actions greater certainty is required than in others. As in real actions and according to the old rule mixed ones also. Greater certainty is required than in suits to personal chattels, and the reason given is that the Sheriff may know from the face of the Plea itself without

11 Co: 55 Do: 552 - Salk 254 3 Mod: 23 1 Burr 620

any extrinsic proof. what lands are the subject of the suit. or those of which he is to give possession.

So in detinue more certainty is required than in actions for damages done to personal chattels. 3 Lev: 303 12 Mod 3

And as to the last instance where damages are recovered for injuries to personal chattels the rule is. if the description of the thing be such that the Jury can understand according to the common acceptation of language what is meant by the description it is sufficiently certain. 12 Mod 3 2 Stra: 809 Hilar 80 1 Mod 2 & 9 2 Saund 74 a 6

In Replevin the rule is less strict. In the case of Ejectment the rule is greatly relaxed. Hard wicke 119 2 Stra 1015 1 Burr 629

Where the Nature of personal chattels is not specified the Pleadments certainty. 1 Burr 455 2 Stra: 736. Hilam 70 Fortescue 377

According to the current of Modern authorities if the want of certainty in the description of personal chattels in an action for the recovery of damages for injuries done to them. goes only to their number generally or greatly. and not to their general nature or kind. the defect is cured by verdict. Thus a parcel of threads, a Library of Books, and Blankets, are good and sufficient descriptions after verdict in an action of Trover. And where the thing to be described is mere matter of aggravation much less certainty is required than in things which go to the gist of the actions. Indeed any degree of generality in the former is not objectionable in point of form. 3 Wils: 292 2 B. Rep. 942 2 Vent. 266 Salk 655

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Waters, case in 5 Coke 54 then. cannot be Law and to the case in 2 Ld Raym 1410 cannot be Law.

The reason why certainty is required is said to be that unless it is so the Deft cannot plead it in Bar to another action for the same cause.

This is not the true reason for it can be pleaded in Bar. The reason is stated by Lord Mansfield 1 Burr 2450 to be this, That the Deft could not otherwise justify. or in other words it is to enable the Deft to discover with clearness the precise thing upon which he is sued. so that he may know how to adapt his defence to the Plffs claim. 2456.

2 Bacon Ab: Pleader 185 The Law never requires any greater certainty in the description than the thing will admit of.

If a Plea contains several subject matters some of which are sufficiently, and some not sufficiently described. the Plea will be good as to those things which are described with sufficient certainty and for them the Plff may have judgt. or in other words a Plea may be good in part and bad in part for want of certainty. Thus in Trover A declares that B. took away such and such articles describing them properly, and also divers others. Now all the articles described are good. but divers others is altogether uncertain and the Plff cannot have judgt for them. The Deft cannot demur to the Plea. It is indeed the Jury give a general verdict. and entire damages. the Plff cannot have judgt. for the Ct cannot know for how

1 Salk: 218. 2 Saund 379 Comyns Pleader C. 32.

much to render judgt. The Jury then ought to sever the damages & the cause to give any thing for the surplusage, and then the Pltff can release the surplusage, and have judgt for the other.

Where there is a defect in the Declaration, advantage cannot regularly be taken of it by a plea in abatement. It is not the office of a plea in abatement to attack the pleadings. It reaches the writ only.

Yet the plea in abatement may be founded on a defect in the Declaration. As if there is a misnomer in the name or a variance between the writ and Declaration there must be a plea in abatement for there can be no demurrer. Yet the effect of a plea in abatement is to destroy the writ.

A demurrer is the proper mode of attacking an insufficient Declaration. tho when the Declaration is a subject of general demurrer, arrest of judgt may be moved after verdict. 4 Bac: 8. Salk 212. Do: 220.

In all cases where the Com. Law requires a Contract to be written, it is necessary in declaring upon the Contract to aver that it is in writing. Thus if an action is to be brot upon a Contract of Apprenticeship the Pltff must state that the Contract is by deed for the Com. Law requires that this Contract should be by deed. So in case of a Release this must be averred to be in writing. So if a Contract unknown to the Com. Law but created by Stat. is required by the Stat. to be in writing, it must be declared upon as in

writing, As in case of a devise of lands. This is unknown to the Common or Feudal law. There was no such thing as a testamentary disposition of Real property at C. law. The Stat Henry 8 th created the right and requires it to be in writing. In declaring on a devise then all the requisites of the Stat. of frauds and Perjuries must be stated. as that it was in writing and subscribed by three witnesses.

Yet if a covenant recognized by Com. law and not required to be written, is required to be written by Stat it is not necessary to declare it to be in writing. This applies to all executory contracts under the Stat of frauds and perjuries. The reason is the rules of pleading are rules of Com law settled while these contracts were not required to be in writing. — The Stat does not introduce a new rule of pleading but a new rule of evidence. — Why then it may be asked does not the same reason hold in case of a devise before stated?

6 Coke 38
12 Mod 540
B. N. P. 279

I answer the distinction is correct. because a devise being unknown to the Com law. there could be no rule of pleading it established by the C. law. — The Stat of devises creates a new species of common assurance not merely a new rule of evidence.

But still if any of these covenants or agreements contemplated by the Stat of frauds and perjuries and by it required to be in writing are to be pleaded in bar, they must be averred to be in writing. be sure as Justice Buller says as he has admitted by his plea

Pleas and pleadings.

To prima facie a cause of action on the Pltff. he must B.N.P. 279
destroy it only by a Bar complete in all its parts.
In declaring upon a Bond or Bailing the Pltff is not bound
to set forth any more of it than is necessary to entitle
him to a Recovery.
It is commonly the case that Contracts contain stipu-
lations on both sides. When there are these distinct
stipulations some of which are of no use to the Pltff
the Pltff need not state them in his Declr. The Deft may
pray oyer and take advantage of them if he chooses
by way of defence. This rule however must be under-
stood with some qualification. for if the stipulation
is embodied or incorporated with the particular
stipulation recited in the Declr. the Pltff must state
it because it goes to make a part of it. either by
qualification or exception. As if a covenant to
pay a certain sum in work provided the Pltff does
this and this: Now here the promise is incorporated
with the cause of action and goes to a description of
the thing stipulated. There is a promise and a
condition precedent and they must both be stated
So where one covenants for quiet enjoyment and
the payment of rent. the rule is the same. This class Doug. 642-
of cases form the only exception to the general rule.
It is a general rule in declaring that where from
the facts stated the Law will imply a Contract it
is necessary for the Pltff to recite the promise. or
in other words as to aver it. As in Indebt. he leaves 4 9
must state the promise as well as the facts 2 Root 174

which go to shew the foundation of it —

All declarations are either

General — — — — — or — — — — — Special

A general Narr is one which states the cause of action generally. A special Narr is one which states the cause of action with particularity or all the special facts. Indebitat for money had and received is a general Narr, where it does not state the particular facts or the special manner in which the promise was to be proved tho if all the facts had been stated it would have been a special Narr. 1 Bac: A:

Where an action is brot on the penal part of a Bond with declaring on the condition. The Narr is general and is used both in Engd and in Connt. Though the party may declare on the penal part and on the condition too, and shew in his Narr. that the condition is broken. This however is an unusual way of declaring. It is like what Lo Holt says. Keeping before we get to the title. 1 Bac: C:

In Ejectment if the party merely states that he went on under a lease &c &c. when he founds upon a title without deducing the title. This is general, but if he deduces his title as under a lease it is a special Narr.

Of the Joinder & parties in one Narr.

There are a vast number of cases which shew the particular instances in which the joinder of parties is bad.

A Joinder is where a suit is brot in favour of two

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or more Pltffs or against two or more Defendants -

When two or more persons are jointly interested in a right, they not only may but ought to join in any action which may be brot for the violation - & in the rule is the same whether the action is real personal or mixed &, whether it sounds in contract or tort - & in the case of joint Obligors or joint tenants & the right is in him in whom the violated right is so it is in them in whom the violated right is - & Tenants in Common must for certain purposes join in an action of Trespass -

5 Co: 19 a
1 Saund: 291. 153
5 Coke 18 b
5 T. Rep: 651
1 Comyns 10
6 Mod: 164 -

ut supra -

There is however a distinction between the cases of contract and Tort - as where the action is brot on a contract the Non. joinder of a necessary Pltff may be taken advantage of under the general issue, or it may be pleaded in abatement, because the Contract proved cannot be the same as that described in the Writ - Thus if a joint promise is made to A & B and A declares upon it alone he cannot recover on the right of B. who possesses an undivided moiety of the right - But where the action is founded on Tort the Non. joinder must be taken advantage of in a plea of Abatement & not under the general issue - & if A & B own a house which is taken in Trespass & A alone declares for the Trespass, abatement must be pleaded. - In Sedfield, one of the cases cited is against the principle, but that has been questioned & seems not to be Law -

2 Stra: 920
5 T. Rep: 18
1 Bos & Pull 67
5 Coke 18 a
Salk: 42. 290
Stra: 1146 -

6 T. Rep: 766 -

6 T. Rep 766
Salk: 4. 290
Stra: 1145
5 T. Rep: 651. 651

Pleas and pleadings—

But where a several right is violated, i.e. a right vested in one person only, another person may not join with him in a suit for the violation of that right. This would be a misjoinder and a defect on the face. For this the deft is liable to the proper person he is not liable to a stranger. As if A and B should sue for a trespass committed on the land of A alone this may be taken advantage of in a plea of abatement and the better opinion seems to be under the general issue likewise. but this is not clear—

Cro E: 143.
1 Leon: 315
1 Com D: 13.

In actions by joint Executors all must join tho. one is under age. so that he cannot act though he has not proved the will may though he has refused the trust. The reason of this is. the rights of the Exors is so entirely joint. that it cannot be severed. The right of two Executors are entire as. Tho. one of the Exors may not be compelled to act. yet he must be named in the writ. well. what is to be done. Why then the writ must be brot jointly and a severance of the Exors who will not act. may then be made—

1 Saund 291 n 8
Salk: 3, 37
Do — 96

But there are rights which cannot be holden by two or more jointly, and therefore two or more cannot sue for a violation of them. Their right of personal security and personal liberty never can be joint. the right of property may be. In the two former cases there can be no such thing as a joinder of parties. If then the same actionable words are spoken of

two persons—they cannot join. the right of ones reputation is not the right of the other. The character of each is thus exclusively and no joint right is violated. & publish a libel of two persons they cant join in a suit as one. There is no joint right violated. So if two or more persons are beaten by the same person they cannot join for the same reason. 4 Bac 10 Bro Cas: 512 B. & P. 5. Espinasse: 504

As to the slander of Letts—the true rule is thus. If the cause of action arises from the joint act of two parties. they can be sued together. If not. they cannot be joined as Co. defendants upon this point as to the reason of the rule there is nothing said in the Books. Bro Rep. 674 Esp.: 504 B. & P. 5 Bulstr: 13.

Suppose then two persons at the same time and place utter the same slanderous words of A. he cannot sue them together as Letts in one action. Any act in speaking these words is not your act. There is no joint act in the case. There are cases where persons may be joined where they unite in the same act. Thus if two persons join in a Trespass. they may be sued together. the act of each contributes to give effect to the act of the other. All the acts are considered as one indivisible one. 4 Bac: 511 4 Peverton 124

So in malicious prosecution which is a tort also they may all be joined. Slander however does not stand on the same ground with a Malicious prosecution. Slander being a wrong merely while malicious prosecution is a tort. Slander arises ex delicto Hobt 6 4 Bac: 10 2 Lutch 262 2 Burr 985 2 S. Rep 1199.

but is merely a wrong, there being no other, but words spoken. no positive act committed to make it a Tort. But in a malicious prosecution there is some thing more than words spoken. a positive act is here committed. Altho slander is a wrong and malicious prosecution a tort Still they are causes of action of sufficiently the same nature to be joined in the same writ. for they are both actions on the case. The fact is according to Justice Buller every cause of action arising ex delicto is not a Tort and he takes this distinction viz in every cause of action arising ex delicto, there must be some positive act. some degree of violence or force to make it a Tort. So if two join in publishing a libel they may be sued jointly. for one may write one part and the other the other part. this supposes a Tort, an act done. In the case of Torts the rule of distinction is this. Those acts in which the law supposes any degree of force may be committed by two jointly. when that cannot be supposed it cannot be committed jointly.

In enquiring what torts may be joined in one Writ I observed there were certain acts which could not be committed jointly. of course an action for the violation of them cannot be brought.

Further, two persons can never be joined in one Writ as defts for distinct torts by them committed severally. Thus if A commits a Trespass upon B's and

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B. afterwards commits a Trespass upon P. A. of the same nature he cannot sue them together. Where the cause of action does not arise from the joint act of both parties.

In case of Contracts if there are two or more persons claiming jointly under a contract and of them dies, he cannot sue on the contract or join the survivor in an action; the contract being joint the whole remedy survives to the survivor. Thus a Bond is given to A and B jointly. A dies, the whole right of action survives to B. 1 B. & Pullen 445 1 East: 497.

If two or more persons bind themselves by a joint Contract, they must all be joined as Deefts in the action. Such is not the several contract of either of them, it is not his or any one of them also Contract but theirs, the Contract of all together — Salk 393 1 East: 497

But if two or more bind themselves jointly & severally each or all may be sued at the Pltffs election. for it is the act of each as well as of both or all.

But if three or more bind themselves by a joint & several Contract, the action may be brot as all or one, but it cannot be brot as two. he cannot sue more than one unless he sues all, for the Contract must be considered as joint or as several. If it is a joint Contract all must be sued. If it is a several Contract one only can be sued. But he cannot treat the Contract as two thirds joint and the other third several. Yelv: 24 1 Dy: 238 37. Hep 782 1 Saund 291

And if two or more bind themselves together by one contract it is joint of course, unless the terms of it imply a several duty or obligation. It is true the words severally need not be used, other words may be used to shew that it is the intention to be bound severally. E.G. of a promissory note is drawn thus We promise &c., this is a joint obligation.

2 Atk: 31
Bl. Rep: 175 &
1 W. Bla: 234
5 Burr 2611

If A delivers goods to B. to be delivered to C. and B fails to deliver A and C cannot join in an action vs him. For tho. each may have a right of action vs B. tho it is on different grounds.

This rule is established as it is laid down. but Mr G thinks that C. in this case has no right of action whatever for B is A's agent not C's and C is no way privy to the transaction.

1 Bac: Ab: 10
1 Bulst: 68
Bendr: 321

It is supposed that if goods are delivered to B. to deliver to C. that C. must sue in Trover. if money, then the action must be in deb: upt.

Butl: 220
Bonet 343-
Do - - 353-

And as to a contract which is joint with respect to obligees, when one dies, his Exor or Admor cant sue alone or with the Survivors. So on the other hand if two persons bind themselves by a joint Contract and one dies, his Exor is not liable to be sued in a suit with the surviving obligor or debtor. At law he cannot be sued after the death of the Survivor It is the nature of a joint interest and a joint duty to survive entire to the survivers party.

But if two bind themselves by a joint and several obligation, the Exor or Administrator of the deed

obligor may be sued alone, but he cant be joined with the surviving obligor. So if there are two or more joint and several obligees, the Representatives of the deceased may sue on the obligation. 1 East 400

As to suits vs Exors the rule is the action must be brot vs all who have administered and not against those who have not administered. There may be three Executors and a one refuses. the creditor is to bring his action agt the two who have administered. This is different from the rule where Exors are sued. But here no harm is done. he is liable to no costs. But in this last case where they are sued if the Exor who refuses the trust does not appear, judgt will go vs him and he will suffer without a possibility of remuneration. Besides where Exors are sued no body knows who they are till they have administered. Com: Debt D 10 / Levins: 161 / 3 T. Rep: 557 / 1 Saund: 291

Of the Joinder of different causes of action in a suit. Some causes may embrace several distinct causes or grounds of action and others not - and here the general rule is that several causes of action being of the same nature may be joined in one Action between the parties - Thus if A holds two promissory notes vs B. he may sue on both of them in one Action and thus Action will contain two Counts. By this rule it is sd is meant, if several causes of action require the same judgt at Com. law they may be joined in one Action. They ought to be 4 Bac: 11 / Comb: 244 / 1 Rerby 140 / Do 160

5 Bac: 191 / 1 Bac: 30 / 2 Vols: 319 / 1 Vent: 366

are said to be of the same nature (as expressed in a former rule) when they require the same judgt at Com. Law.

For the purpose of understanding this rule. It is necessary to know that at Com Law, in all civil actions there were two kinds of judgts viz one ~~Misericordia~~ Misericordia, and the other a Capiatur pro fine. Under the Misericordia the party is not arrested and his person is not taken to response the judgt. Under a Capiatur he is fined and his body is arrested to pay the fine. In all cases committed with force the civil injury is connected with a public wrong and of course the judgt is a Capiatur. In all cases [illegible] with force and arms the judgt is a Capiatur. Where it is not [illegible] with force and arms, it is a misericordia. or in other words where there can be no force presumed. if the Pltff has judgt it is a misericordia. This rule is not universally true tho, it is generally given in the Books-

1 Nelson: 252
18 Vesp: 276
Bango 652.
1 Wheeler 147

It is universally true however that if several distinct causes of action require the same judgt at Com. Law and the same plea or general issue, they may all be joined in one Count. As where it has several Bonds vs B. the issue in all is non est factum and therefore they may be declared upon together So if one has several Covenants by Deed they may all be joined.

If one is entitled to a recovery on several grounds from

-ies. the issue in all is non asst. and the judgt is a Misericordia.

1 Wilson 252
1 T. Rep 276

And to go further, If one person has committed several trespasses with force against another these trespasses may be joined in one Narr. And so may several actions of Trover for the judgt is a Restitution and the gen. issue the same.—

So several actions of trespass on the case may be joined in one Narr. and so may several actions of Trover.—

8 Coke 7. B.
2 Bl: Rep 1146
1 Wilson: 252
2 Do: 319
Cowper: 230
3 East: 70
1 Ventr: 223.

Trover with negligence may be joined as against Bailee Trover and Slander may be joined. and so may Slander and a malicious prosecution.

But these examples of the admissible joinder of causes of actions are those where the judgt and the gen-issue are the same. But where the judgt only is the same the causes may be joined. This is not universally the case but it is sometimes. Thus Debt and Detinue may be joined in one Narr. The gen issue in Debt is nil debet. in Detinue it is non detinet. but the judgts are the same they both arise ex Contractu. Debt on Bond and Debt on simple Contract may be joined but the general issue in the two cases is different.

1 Bac Ab
Cro Car: 20
Do— 316
1 Ventr: 366

Smith, elapses Detinue under the head of torts and was led to do so from the idea that Trover was a Tort and that it was substituted for Detinue. but it is improperly classed.

To exemplify the negative part of the Rule Instances.

Salk: 10
1 Bac 21. 30
1 Mod: 42-

and Contract can never be joined in one Count.
both the general Issue and the Judgt are different-
By the way. I forget to mention the true reason of
the rule- It would introduce endless confusion
into Judicial proceedings to join all causes of
action in a suit. because there may be often as
many different pleas required as causes of action.
Suppose a real action is brot. there is one gen. Issue
Trespass is entered in the same Count. here is
another gen. Issue &c. The law permits the joinder
of several causes of action where it is convenient
without complicating the advancement of justice.
Jenkins 211
5 Mod: 90 44
1 Vent: 366
Tho Ray 233
Ld Ray 568.
2 Burr 1114
2 Wils: 319
Salk: 189-
Trespass, and trespass on the Case, arising ex delicto
cannot be joined in one Count because the
Judgts are different. Neither can case and Contract
be joined, here the Judgts are the same. but the
pleas are different and so are the nature of the
actions. Trover and Debt on Bond cannot be
joined. the pleas are different-
It is true in general however that several actions or
causes of action in Trespass or the same in Case
or the same in Contract. may be joined together
altho. each of them in its particular case may be
different-
This is not however universally true- There is at
least one exception and I dont know but more
i.e. Debt and Account cannot be joined in
one Count. The action of Account is altogether
sui generis. The general Issue is different. the

proceedings in the two actions are different Indeed in account the proceedings are altogether different from any other action at Common Law. In debt the cause is tried by a Jury. In account the first is indeed tried by a Jury. but then the cause goes to Arbitrators who finally determine it. The Judgts then are different for in account there are two Judgts.

Can Ouster and Disp & Battery be joined in one Count the proper action to the first is Ejectment and to the last trespass vi et armis. This question has been much agitated. but Mr G thinks without any good reason. Since it is apparent on rule the Modern Reports that the Judgt and the plea are the same in both.—

In Account the General Issue is not the same in Ejectment and Ouster. Yet Judgt is the same in both.

It may be observed that the Stat 2d Edw 2d. 8 H. 6. & Merry. did away the distinction between the Judgts in Great Britain. Still the difference is kept up between the causes of action as formerly: for the Plff now prays a pone in the nature of a duty when he takes out a Writ commencing an Trespass vi et armis.

The distinctions upon this subject are not settled by any general rule. There is very little difficulty arising from it however. because examples are so numerous. yet there is no positive rule

Hobt: 249

except the universal rule which will apply in all cases. It is a general rule that, not an universal one that where the parties are the same and the converse not precisely true. There is no rule that applies to every case that occurs. In Comyn Mr Q thinks they ought to preserve all the distinctions as in Great Britain.

The distinctions then appear to be these 1st Where the parties and pleadings are both the same there always may be a joinder of different causes of action. 2nd When the parties are the same, they may generally be joined tho. the pleas are different. but this is not always the case. These are the only two affirmative rules. But on the other hand where the parties are different, there never can be a joinder. a fortiori when where the parties and Gen. issue are both different, there never can be. The only chasm is in the 2nd affirmative rule. It admits of as many exceptions as the cases coming within it.

Mis Joinder of causes of Action in one Plea.

The Joinder of different causes of actions which cannot be joined is an incurable defect. therefore the Deft may demur to the Plea or move in arrest of Judgt.

Here a distinction is to be observed. Misjoinder of parties has often been confounded with duplicity in pleading. Misjoinder to be sure amounts to duplicity, but it amounts to more than duplicity.

duplicity, is a mere fault in form, and can be only taken advantage of by special demurrer. Misjoinder is an incurable defect. The real distinction is this viz. A misjoinder of actions consists in joining in the same distinct causes of action which cannot be joined as distinct substantive grounds of recovery - duplicity in pleading consists in inserting causes of action which cannot be joined, one entire and incurable right of recovery. The latter is a mere fault in form; the former is a radical defect.

Suppose A declares against B in his first count in debt on bond, and in the second alledges a battery here in the nature of things the second count cannot be inserted for the purpose of enforcing the first count. Here then are two distinct causes of action inserted for the purpose of enforcing two distinct substantive grounds of recovery. This is a misjoinder of actions.

On the other hand A lends a horse to B. he brings an action on the Case stating the contract & breach or emption and then avers that the defendant the horse maliciously &c. Now this action sounds in tort. while he declares upon a contract. This case is double. He charges him with a wrong. This however is all laid to enforce one right of recovery. Here there is duplicity in pleading.

Rejoinder and Surrejoinder on the Case ex delicto

L Bac: 12
2 Kelson: 313
5 T. Rep: 341
Law of Ct. of ab - - - 9.
East: 396
Cooke: 113.
2 T. Rep: 342
1 H. Bla: 555
2 T. Rep. 167
Stiles 23.
Stiles 202.

cannot be joined. Yet it seems that Assn en Trespass breaking his house, destroying his goods and beating his Servt. per quod servitium amisit is good. In the first place you will perceive this is all one continued trespass: but there is another reason, according to the English forms of proceedings an action per quod servitium amisit is usually accompanied with Trespass with force. Tho they are substantially different, yet the per quod is rather matter of aggravation than any thing else. I should go on prescribe further than this. It is usually proper to join without laying a per quod, because the beating will be considered a mere matter of aggravation as to the original Trespass. This may be a question. Where several actions are brot for several things of the same nature the Court before which they are pleading may compel a consolidation of them i.e. may compel a joinder of them in one Count or several Counts. This is mere matter of discretion. It is done when done at all for the purpose of preventing vexation. Thus suppose A brings two actions on Notes of hand vs B. the Court may compel A to drop one suit and join both in one Count or two Counts. Yet on affidavit that there are several defences so that the trial would be embarrassed by all being joined will induce the Court from compelling a consolidation of them. —

Com: 6 -
Bo - 244
2 Hen: 1078
Bo - 1149
2 T. Rep 639
1 Com: 111

Pleas and pleadings.-

Miscellaneous Rules respecting Declarations

The venue should always agree with the writ. The venue is the foundation of all the proceedings. Since it is that which gives the Court authority to hear the cause. If then the Deft is called on the Writ to answer a trespass and in the Narr is called to answer on trespass on the Case (without an action) the variance is fatal. Bro Abr 84 Bro Cas: 325 Bolt: 179. 180

When the Plffs right of action is to accrue by the performance of some condition precedent on his part he must aver performance of that Condition on his part in his Narr. The omission of this is an incurable defect and cannot be cured by a Verdict because it goes to the Gist of the action. The Plff discloses in his own Narr that he has no right of recovery (Much learning is to be found on this subject of precedent and subsequent Conditions in T. R. 638 in the Case of Hotham vs East India Company) 9 Co: 10a 1 T. Rep 645 1 Saund 319 2 H. Bla: 574 7 T. R. 125 5 Com: Dig 515

But there is a material distinction to be observed with respect to the rule of pleading. Where there is a Condition precedent and a Condition subsequent. For when the Plffs right of action is qualified by a Condition subsequent he is not bound to take notice of the Condition. It is matter of Defence merely and must be pleaded by the Deft. The right of action does not accrue by the performance of the Condition- 1 T. Rep 65 7 Coke 10 1 T. Rep 638 Esp Dig 300 1 H. Bla: 284 2 Do: 674

Pleas & pleadings -

Gro Eliz: 645
Comb: 265
Hobt: 78
1 Dan Con: 659
2 Mod 309
8 Coke: 10 -

So of there are in an Contract reciprocal. i. e independent Covenants or promises the Plff need not aver performance of the Covenants or promises on his part. This is directly to the contrary where the Covts are dependant. for then he who sues must aver the performance of the Covt or promise on his part.

In the former case it is Covt for Covt or promise for promise. The one is in consideration of the other A. covenants in consideration of the Covenants of B in the same Barr and B. covenants in consideration of the Covts of A in the same Barr.

But suppose A & B enter into mutual stipulations so that A. covenants in consideration of B's performing his covts and B in consideration of A's performing his Covts. here whenever sues the other must aver that he himself has performed or has tendered performance -

L. Raym: 229
2 Salk 436
Cro Eliz 816
2 Shia 621
1 Wilson 99
2 Doug 203
2 Salk 463
Colett 305
Cro Eliz 361

Those facts which constitute the gist or substance of the action must be expressly or positively alleged. not by way of recital. - As in the case of Debt before game where the Plff says. Whereas the Defendant &c thus would be ill, for the gen. species averred be whereas he did not &c

Formerly it was holden that an averment of this (release) was a radical defect and not cured by verdict. I take this not now to be law. It is certainly good after the verdict and the general opinion is that it is bad only on Demurrer and is not the subject of a general demurrer. The old

on pleading are much more strict than the modern ones.

But this rule does not hold as to such facts as are not traversable by plea. however apparent they may be and this inference I make from the established form of pleadings in a great variety of cases. In assumpsit, it is the established form of pleading that the consideration is stated by way of Recital & not by direct averment. The consideration in fact cannot be traversed by plea because it would amount to the general issue.

So in trespass possession is the gist of the action. But the Plff never need state that he was possessed of such goods. He may state that whereas &c. and this is not traversable by plea. I take it to be clear then that the rule does not hold as to such facts however material which are not traversable by plea. They need not be stated directly and positively.

Hobt 5. 18 & 4 Coke 18 10 Coke 77 Pleas and appearances 10 &c

Nor does the general rule hold as to mere matters of inducement (and by the way they are not of themselves of the Essence of the action) The rule does not in its Terms extend to inducements.

4 Bac: Ab. 13. 14 Popham: 177 Yelverton 70

The subject of the suit must be asserted in the Bar with certainty. See the rules above with regard to certainty in pleading.

It is said to be of sufficient certainty if the Jury can learn what is meant. Thus in Ejectment the Miles and Bounds of a field are not described as in Count but only the place where it lies.

It has also been holden that Prower but for a

Pleas and pleadings-

Bhs and deals, was a sufficient description; & the Prover-brat for some fish, or for some pieces of linen, was holden bad. But for a library of Books it was holden a sufficient description. But this is quite too loose and vague - The decisions are somewhat arbitrary -

If the Narr is good in part and ill in part, it is not for this cause demurrable. The Plff may recover for that part which is good. Thus if the Plff sue on two Bonds, and it appears on the face of the Narr that one of them is not payable or that it is void, the Narr is not demurrable, for if he can recover on either of the Counts that Count is good and on it he is entitled to judgt.

Hobt: 178
1 Rolle 78 & 80
10 Coke 15
H. Hayd 395
Yelverton 45

The rule however seems to me in its nature to be confined to those cases where there is one certain cause of action well declared on. For if the Narr is ill in one part, when all the parts make but one cause of action the Narr is demurrable, for all the parts except mere surplusage are necessary to constitute one ground of action. The Narr is ill as to entire cause of action -

Hobt: 178
B. N. P. 98
10 Coke 130
3 Wilson 177
2 Burr 985
2 Wm. Bla: 818
1 T. Rep: 508
Do - 532
Salk 384
Do 532

Tho there are distinct demands in one Narr, one of which is good and the other ill. Tho this Narr is not demurrable yet if the Plff obtain a general verdict and entire damages, judgt must be arrested. Thus in an action for Slander - for two distinct sorts of Words, if one part is bad, and a verdict is found entire judgt must be arrested for the Ct cannot determine how much was given on the false ground -

Pleas and pleadings.

And here it is necessary to explain not only the true reason of this but the distinction between this and the common cases of arrest of judgt — — You know it is a general rule of pleading that every defence which will support a Motion in arrest of judgt will support a general demurrer. But here arrest of judgt takes place and yet the Plea is not the subject of a general demurrer. How is this case reconcileable? The answer is easy. The rule above laid relates to insufficiency in the pleadings. There is no such insufficiency in the present case. The Plea is good. The insufficiency is created by the Verdict. It is arrested for defect in the Verdict. There is then no difficulty in reconciling the cases.

You perceive then according to the true spirit of the the rule, when the Court can determine after verdict from the face of the Record the precise amount of each distinct demand, judgt will not be arrested altho there is one bad Account. Hobart 178

If the Jury should assess greater damages than the Plff demands, this will not of course destroy the Plea or action. In that case the Plff may release the surplus & take judgt for the residue or the Ct will without a release may give judgt for the sum demanded. The Jury are not authorized to give more than the Plff demands for the Court has not been called to answer to more than a certain amount. A remittitur then may be entered by Plff — The rule is the same if the Plff demands more than he by his own showing he is entitled to. If the Jury give more than he is thus entitled to. Here he may release the Stiles 364 1 Bac: 25 2 Bulstrs 280 Ld Raym 183 Hardr 58 Moore 85

1 Rolle 785
4 Bac: 26
Esp: 304
2 T. Rep. 113.
Co. 123.

excess and take judgt for the residue. This may often happen in actions on Contracts. The rule of damages on Bonds is the debt and Interest. The Jury gave no more. If then the Plff demanded more than this and the Jury gave it. he may remit the excess. or the Ct may do it of course.

A Plea may be cured by a plea in Bar even if it is faulty in substance. This was treated of before under the general rule of pleading.

We now come to treat of the Pleadings which follow the Plea. These consist of those allegations which the Deft makes by way of defence and those which the Plff makes by of answer to the Defts defence —

Pleas are of two Kinds
Dilatory Pleas and Pleas to the action —

Dilatory Pleas.

Dilatory Pleas are used for the mere purpose of delay and often without any foundation in truth whatever. And if an issue in fact was taken on them it went to the Jury.

3 B. C. 363
3 Nelson 51
4 Bac: 35
1 Com: 2.

But now by the Stat 4 & 5 Q. Anne no dilatory plea can be admitted without an affidavit of the truth of some circumstantial matter to induce the Court to believe it to be true. And this affidavit is made under the pains and penalties of Perjury.

In Court we have no such as this and have no need of any. because pleading a false plea here would answer no purpose because it could not of course procure an imparlance. —

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Our stat requires that a dilatory pleas shall be tried at the Commencement of the Term. of course it can pro cure no delay. Indeed in the Com. Pleas they are to be seen in, heard and determined within three days after the Commencement of the Term.

These dilatory pleas are subdivided into three kinds - Cohale because the division of Blackstone - It is the most simple and the best calculated to give an idea of the subject. They are

1st Pleas to the Jurisdiction of the Court -
2nd Pleas to the disability of the Plaintiff &
3rd Pleas in abatement. of these in their order.

I Of pleas to the Jurisdiction of the Court -

The causes of this plea are various. It is a presumption of objection to the jurisdiction of a Court of limited jurisdiction that the cause arose out of the local limits of the Court. This rule in Court applies only to the Courts of incorporated cities.

Barth: 11
1 Bac: 5
3 B. Com 303
Salk 544
1 Com: 5

So also if the Deft has any privilege by which he is not liable to be sued in a particular Court or any other than a particular Court - If then he is sued in any other then plea may be put in. This has been considered as a plea to the person but it is not. As in the case of Attorneys where the Deft of which the Atty is an officer has not cognizance of the subject matter he may be prosecuted in any other Court. Is this a plea to the Jurisdiction or to the person? Clearly to the former. The plea is I am an officer of another Court and therefore this Court has no cognizance of my person. I am not bound to answer your complaint here; I cannot then is no such privilege -

1 Bac: 35. 1 Co Lit 282 Salk: 2. Bald: 177

This privilege of attorneys holds only in actions brot vs them in their own right and not in autre droit. Thus if an action is brot vs an Exor he is suable just as any other Exor is. He is sued in right of his Testator and he communicates this privilege to the assets of his Testator so if he is sued with another who has not the privilege he loses his privilege. This privilege is not communicable. His Co-deft is liable and so must he be.

3rd another ground of exception to the jurisdiction of the Court is the want of cognizance of the subject matter of the suit. Thus if a person is indicted for murder in the Ct of Com. Pleas he may plead to the jurisdiction of the Ct. or when one is sued in a real action in B.R. the same plea may be used. It is to be observed the deft need not plead in this case to the jurisdiction of the Ct. for the proceedings (if any are had) are coram non judice and therefore void. Therefore the Ct act in such cases ministerially.

1 Bac: 35 10 Coke 68 1 Vent 333

When there is a want of jurisdiction arising from some personal privilege of the deft. or the cause of action arises out of the local limits of the Ct the deft must plead it or he waives it. When the subject matter is cognizable by the Court it need not be pleaded for the Court are bound ex officio: See title False imprisonment.

Anciently no action whatever could be tried except in the County where the cause of action arose. This is not now the case as to Cts of general jurisdiction. It is therefore no ground of exception to a Court of general jurisdiction that the cause of action (where the action is transitory) arose in a foreign country.

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The forms of pleading correspond indeed with the old strict rule of the Com law- and the cause of action is alledged to have arisen in the County that a videlicet is always inserted. This obtains only in transitory actions. But as to local actions it is otherwise. Thus where the fact at Com law acts in rem. it is impossible for the court to try it if the subject is in another County. The rule is the same also in criminal cases. The penal laws of every sovereign state are strictly local- of course the cause of action is strictly local.

Cowper 161
Do --- 175
Do --- 181
2 H. Bla: 145
Do: 161. a-

Personal actions are generally transitory and mixed actions are local. The first poleon the persons of the parties- A plea to the jurisdiction is regularly the first plea in the order of pleading on the part of the Deft. for the exception when necessary to be taken by plea is waived by any other plea- If then in a case where a want of jurisdiction might be pleaded, another plea is put in, he submits to the jurisdiction

1 Gmat: 127
Hobb: 164
4 Bac: 7. 28
Burr: 35
1 Com: 5
6 Co Litt: 172 b

But there are cases where the Deft cannot give jurisdiction and these are where the Ct have not cognizance of the subject matter. So also in local actions

According to the English practice a plea to the jurisdiction is always to be signed by the party himself and not by his attorney- because if done by an attorney it is supposed to be done by leave of the Ct and as being leave acknowledges jurisdiction of the Court- All other pleas are regularly signed by the Attorney-

6 Mod 116
Barnes 190
3 Bl Com 303
4 Bac: 35-

In Connt we do not make this distinction. The Atty signs this as well as any other plea. The rule is somewhat unreasonable and can be of no use -

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3 B. C. 303. Salk: 298 Laws: 109.

This plea concludes to the cognizance of the court, by praying judgt whether the Ct will have further cognizance of the suit. The form is. And the said A. B. prays judgt whether &c.

In Court when an action when an action is dismissed on a plea to the jurisdiction. Costs are taxed in favour of deft. When it is dismissed by the Ct ex officio no costs are given.

It seems to be questionable whether the Ct can render judgt for costs when it has no jurisdiction of the suit. It has no right to render judgt except for that which is indispensably necessary. This practise I believe says Mr Gould is exceptionable. It is said the allowance of costs is intended to prevent the deft from suing the Plff for malicious prosecution. But this cannot be effected. The costs taxed are not a rule of damages. nor are they actual indemnification. Besides the deft ought to have a right to have his costs taxed by a jury. Thus far of pleas to the jurisdiction.

III Pleas to the disabelity of the Plff. The grounds of the plea are various especially in England.

1 Bac: 2. 4 Co: 35 1 Com: Dig: 3. 3 Bac: 671. 2. Co: 76 2 Litt. 197 Co: Litt: 128 a

1st Outlawry of the Plff is a good plea to his disabelity. This is a title unknown to our law. It is practised upon however in the State of New York.

The outlawry of the Plff cannot be reversed or pardon obtained as a good plea to his disabelity. because the outlaw is so far out of the protection of the law that he cannot enforce his rights in a Court of justice.

4 Bac: 35 Laws: 102. 3.

This is not however an actual abatement of the suit. It is only a tentionary impediment. for when a pardon is obtained or the outlawry reversed. he may be called to answer in the same suit. if the cause of action is still remaining &c.

This disability extends only to those suits brot in his own right and not to those brot in right of another - As if he sues as Exor it is no objection that he is an outlaw= The outlawry is intended as a punishment for him. 3 Bac: 762
But if it ought be pleaded to an action brot by him as Exor the punishment would fall upon the Creditors or Representatives of an innocent man - 1 Mod: 128
But in an action brot by an Exor or Admor the outlawry of the deceased Testator or Intestate may be pleaded for here the disability goes to the person whose right is to be enforced - The Testator could not transmit to another the right to prosecute a claim which he himself could not enforce - 1 Com: Dig: 6. 6. Lutw: 1604
But the an outlaw cannot bring an action in his own right - he may be sued as any other person. The outlawry is intended to deprive him of his civil rights and not to furnish him with an immunity - 3 Bac: 761 1 Salk: 60 Ploy: 1 —
This disability is always pleadable as a dilatory plea and sometimes may be pleaded in Bar. The rule of discrimination is this, When the cause of action is forfeited by the outlawry the disability may be pleaded in Bar, as well as a Dilatory plea. As in felony where the action concerns his goods chattels lands or Tenements for they are all forfeited by the outlawry - on the other hand where the cause of action is not forfeited by the outlawry the objection can be taken only by way of dilatory plea - and this is always the case where the damages are presumptive as in slander, malicious prosecution & case - because the causes of action cannot be forfeited they are unalienable. and even where the damages are not presumptive if the action concerns property 1 Bac 14 3 Bac: 761 5 Coke 109 1 Salk 29 Dyer 128. 7 Coke 29 Dyer 227

and the property is not forfeited. the disability can be pleaded only as a dilatory plea –

2nd Excommunication, This is a second ground of pleading to the disability in Engd. This prevents the Pltff from suing on his own or another's right. tho he is supposed to be unqualified to dispose of goods in foro usus. which was formerly done by Execrs and Admrs. And this rule holds now in Great Britain – This plea does not abate the Writ but only discharges the Deft sine die liable to answer to the same suit when absolution is obtained –

1 Bac: 13.
4 Do 34 or 36
2 Do: 319 –
1 Rolle 883
Co Litt: 133.4
3 Coke 65

Absolution is the only good Replication to this plea. Here again we see how dilatory pleas differ from pleas in abatement – This species of disability is unknown in the U. S.

2 Bac: 320
Do: 829, 8.
Co: Litt: 133.4

3rd Alienage – A third ground of pleading to the disability of the Pltff is alienage – This is sometimes pleadable to the disability but not always – For the purpose of considering the subject we must look at the distinctions on the subject of Aliens –

An alien friend if not naturalized or made a Denizen can maintain no action real or mixed. But an alien friend may maintain personal actions. The reason of the former rule is, he cant hold Land – The policy of the Common Law is such that he cannot, but every real action is for the recovery of Lands, tho he cannot hold Lands therefore he cant recover them – But an alien friend may hold personal property, therefore he may maintain an action for it – The actions then real or mixed it is a good ground of defence that the Pltff is an alien. In personal actions it is not so –

Com: 171
3 B. C. 384
1 Bac 4 –
2 Bla 162
2 Shia 1682

Per Kerly 4 B. see a strange decision. not Law however –

Pleas and Pleadings—

The distinctions now taken relate to an alien friend—
On the other hand it is a general rule that an alien enemy can maintain no action whatever either real personal or mixed. An alien enemy unless a prisoner of War can hardly be in a situation to bring an action. But a prisoner of War can maintain no action generally before courts acting under the authority of that government which holds him a prisoner. By this you will not understand that the personal rights of a prisoner are destroyed. No, the public will punish one who violates his rights—The reason of the rule is founded on a state policy, because the recovery of their debts tends to strengthen their adversaries and enlarge their resources—

Ita: 1082
1 Bos & Pul 163
6 D. Rep: 2349
Doug 624 & 619
Do 624

There is an exception to the Rule of an alien enemy for he may maintain an action on a Ransom even tho he be made a prisoner with his hostage and this under the law of nations recognized by the municipal regulations of every Country. Indeed if this were not so, then ransoms could never take place. Good faith & honesty between sovereign states would be done away.
A celebrated and interesting case is reported in Cowper 161 where it was contended that no recovery ought to be had because the alien enemy who brot the action was a prisoner of War. That the hostage and Ransom Bill were both retaken and therefore no longer the enemies property. But L. Mansfield in a learned argument over ruled every objection and decided in favour of the alien enemy—

Doug 619
Cowp 161
3 Burr 1734

So also an alien enemy residing in a state or at War with his own under a license protection or safe con

Pleas & Pleadings -

1 Roy 282 Sells 46 - Show: 1082 & 7 Rep 166 -

Alien friend Government may maintain penal actions But in this case he is not an alien enemy, quoad hoc he is a member of the State and an Alien friend - Whether an alien enemy not residing under a license protection or in right of another as Exor or Admor seems to be doubted - The point has never been judicially settled - Reasons of policy are against it and reasons of justice are greatly in favour of it - Sometimes the former reasons are also in favour of it for the effects may belong to the subjects of the country where the action is brot - An alien friend may hold leases as Exor, but in his own right he cannot of course - If he bring an action as Exor to recover a leasehold his alienage is not pleadable to his disability -

Croker: 5. 26. 1 Bac: 864

4th Premunire, Popish Recusancy, Attaint of felony and being a Monk professed are all disabilities in England - but as they are unknown in our law nothing will be said of them - In some of the U. S. there is however attaint for treason or felony but it is not certain that in these States this is a disability at any rate it can be of no consequence to us -

3 U. S. C. 301 1 Com: J

5th Coverture - Another ground of pleading to the disability of the Plff is Coverture -

L. Bac: 39 Co. Litt: 132 - 1 Bl. Com: 443 4

Thus heretofore where a feme covert sues alone without her husband the Deft may plead the disability and defeat the suit - The distinctions on this subject are also to be found under the Title Baron et Feme -

38. Rep. 681 Lawes 105

I would merely observe the Husband must be a party to the suit when it is brought to enforce a right of her own - True there are exceptions as when the

husband is a civil death sometimes. The reasons of this are given under another Title.

The Coverture of the Pltff is pleadable only as a Dilatory plea. It cannot be pleaded as a plea the action. This is not a plea in abatement as said by Lord Kenyon. It differs from it in form and effect. 3 D Rep 361 1 Bac: 44

And generally, whatever may be pleaded as a dilatory plea cannot be pleaded to the action. This is not an universal rule. 6 T.R. 76 &

And if a feme sole marries pending a suit the left may plead it to her disability. However if the time for pleading it as a dilatory has elapsed it may afterwards be pleaded because the exception accrued after the proper time of pleading. In Count the rule is established by that. The husband may appear & put the coverture on the record and go on with the suit. 8 B.C. 816 4 Bac: 39 - Hut: 577

6th Prisoney. That the Pltff is an Infant suing without his Guardian or next friend is pleadable to his disability. An Infant cannot appear an attorney because he cannot make a power of attorney. Of course he must appear by Guardian or next friend. 8 Bac 11, 8, 9 3 B. C: 301 1 Salk: 44 1 Salk: 135 Carth: 123.

And more, it is said to be pleadable to the disability of the Pltff - that he is not in esse. that there is no such person in nature. This objection should be taken either to the action because pleading to the disability admits that the Pltff is in existence. Lanes 104 3 B. C. 101 1 B. & P: 44

These are all the enumerated pleas of pleading to the disability of the Pltff -

These pleas conclude to the person of the Pltff whereof he prays judgt if the said P. Pltff ought to be answered - 3 B. C. 303

Pleas & pleadings -

Lanes 103. 9 Ciceo 585

Lanes makes a distinction between a permanent absolute & a temporary one - In the former case the form is as above - in the latter should be Ebnd the sentence prays judgt that the Plff may remain without day until &c.

IIIII. Pleas in Abatement - -

1 Prat 134 6

The word Abatement in the law means prostration or demolition. as in the case of Nuisance To abate a Writ then is to abolish it -

3 B. C. 301 1 Bac: 15 Salk 2 95 6 Mod: 172 2 Lev: 251. 4 -

Pleas in abatement extend to the Writ only - Mistakes in the Count or Name are to be attacked by pleas of a different kind -

3 Bac: 624 3 B. C. 301. 3. Lanes 105 5 Mod: 132 Do: 144 1 Com. Dig. 236 4 Bac: 8 -

This rule tho generally is not universally true - It is universally true that a plea which goes to the Writ only, is always a plea in abatement but e converso it is not universally true that a plea in abatement cannot extend to the Name for if there is a Misnomer in the Name: or a variance between the Writ and a Name abatement may be pleaded -

Thus in Count we have a practice of pleading in abatement to a variance between an Instrument declared on and the description of that Instrument in the Name - In Count there is not the same distinction between the Writ and Name as in G. Britain - In Count the Writ consists of that part of the Record which precedes the statement of the facts or cause of action - Indeed the Writ contains all the part of the Record from its beginning to the statement of the action - Whereupon commences the Name

which contains the statement of the facts. The date is common both to the Writ and the Plaint. The signature of the Clk or Magistrate. the necessary sureties for prosecution under the certificate of the payment of the duty. all belong to the Writ. These you will observe are no part of the pleadings.

In all pleas in abatement the greatest precision and accuracy is required. The reason of this is pleas in abatement are not favoured, they are odious in the Law: they, Dont dispute the cause of action. but only the form in which the claim is prosecuted. Hence the least inaccuracy in a plea in abatement is fatal. It is said it must contain certainty to a certain extent in every particular. i.e. there must be the utmost certainty in it.

3 T. Rep. 185. b
5 T. Rep. 487
Lanes 55/6
107, 134 —

Causes of pleading in abatement.

The causes are very numerous both in Great Britain and Ireland. The causes may be either intrinsic or extrinsic — i.e. the exception could have been taken on the face of the Writ, or it may be extrinsic. ——

II Misnomer. and want of addition are grounds for pleading in abatement.

And first. as to the Christ. of misnomer as to a Christ is cause of abatement. and this whether the Mistake is in the Writ or Plaint. A misnomer is a misnaming of the party or person by a wrong name.

3 Bac 604
Salk 7 B
3 B. & C. 302
1 Dicf 247
6 Mod: 165
3 Bac 617.

So also is the omission of the Defts addition a cause of abatement. The addition of a party is a description given of him. in addition to his name to identify him more clearly. This additional description is called his addition. It consists in his title, trade

3 Bac 617 Lanes 106 Cro Car 371 6 Mod 105 Carthi 14

State office, profession degree or place of abode. Thus if an action is brot vs A.B. it is not enought to call him A.B. his addition must be given him. If he is a Knight or Esquire he must be so described His trade also must be given him as Merchant. Taylor &c These are required by the English Stat 1st Henry 5th called the Stat of additions. for the sake of obtaining more certainty. The C.L. did not require all these additions.

This Stat only relates to personal actions appeals and Indictments. and is not to real actions. They continue to be governed by the rules of the com law

3 Bac: 618 6 Mod: 65

The reason of this is. in actions real. as the action is brot vs the party in possession of the subject in dispute. his possession was supposed to identify him sufficiently.

And as the want of addition is pleadable in abatement so is a mistake in giving him his addition pleadable in abatement. As if a Knight to call an Esquire. it is pleadable in abatement. The uncertainty by this is made greater —

3 B. C. 302 2 Roy 1014 1 Com 28

In C. only necessary addition in common cases is the Defts place of abode. But when he is sued in his civil or official capacity where the

officiae capacity is endurement to the action, but is necessary to be added here as well as in Eng. Lands. This is not however to identify the person. it is only to shew the character in which he is sued — Thus is not then properly an addition contemplated by the Statute — So if an Heir is sued on a Bond Debt by his ancestor he must be declared against as Heir — for he is only liable as Heir — So if one is sued as Exer or Admr he must be declared against as such So if a Sheriff is declared against as such, he must be described as such — This is also the case as to all other persons liable in their officiae capacity —

1 Bac 34 2 Vent: 84 Carth: 301.2

But where an addition by way of endurement is unnecessary, it is mere surplusage — and therefore a mistake does not vitiate — the maxim is utile per inutile non vitiatur — E. g. A is sued by a true Xp'en name by himself and is declared as Heir of S.S. This description is nugatory and useless and therefore of no harm — he is not the heir of S.S. it can do no harm —

Bro Ab: 233 Do " 333 2 Bac 621

The misnomer or want of addition in of two to both is pleadable by the other — advantage can be taken of it only by him who is misnamed or whose addition is not set out, because the person who is misnamed may waive it if he chooses and the other both can make no complaint —

8 Bac: 626 Latw: 86 4 Bac: 38 —

And the rule is the same in enumeral cases where two are regularly indicted —

2 Hale 177

A question of this kind has been raised, viz if one of

two lefts is misnamed - and he pleads it in abatement. does the writ abate in toto or only as to the person misnamed? Thus question has not been settled - In the discussions to be found in the Books no mention is made of a consideration which appears to me to be the criterion. It is this. If the caused action is joint and joint only it must abate in toto - If it is joint and several it need not abate only as to the person misnamed -

Lev 96 8 Coke 159 8 Bac 625 1 Com 99 4 Bac 145

When a left pleads a misnomer or want of addition and in general he who pleads in abatement at all must (as the expression is) give the Plff a better writ - He must point out what the writ ought to contain he must shew a mistake and how that mistake is to be rectified. There is no such thing as this in pleading to the action - Thus if one is sued by the name of T. S - he must plead his true name - This is required of him as a condition. So if he is described as an Esquire he must shew his title that the Plff may know by what title to sue him - So if one of two joint lefts is not sued he must not only state that he and another person are liable jointly, but he must state who that person is -

French 363 2 T. Rep 515 -

and he must go further he must not only plead that his name is T. S - and not P. S - but he must traverse that he was called by the name by which he is sued at the time of suing the writ because a person sometimes has two names - It is not indispensable that he should be sued by his baptismal

Willes 344 Lewes 39 Do - 103 Salk 6, 7 - 1 Ld Raym 196 Do - 249 4 Mod 447 3 Bac 624

name. for if he had another name and was called by it, at the time of the writ sprung he may be sued by that name & it is not sufficient to aver that he is called by such a name but that he was called by such name at the time of the writ sprung.

And if according to the rules of verbal criticism the writ admits in his plea that he is the person named, his plea will be bad. If this is done by implication as "the said A. B. &c." it is bad. yet he must admit himself to be the person sued. Lawes 92 5 S. Rep. 487

Advantage is to be taken of a Misnomer by a plea in abatement only. If it works a variance it may be taken advantage of some other way. But this would not be a Misnomer in itself. If he admits by pleading in abatement he waives the Misnomer for a Misnomer is no ground of error. Rolle 98 Earth: 124 Salk: 2 3 Bac: 623-4

And it is also if one executes a Specialty by a wrong name. he must be sued by his wrong name and Execution must issue under the same name and the right name can come in under an Alias. This does not seem to me to be the proper mode of pleading. The only proper way is to sue him by his right name. and aver that he executed the instrument by another name This averment is necessary to prevent a variance. Hut 121 3 Bac: 617 1 Bulst: 216 3 Bac 614 Do — 416 Dyer 273

And the writ should always describe all the Letters by their proper names except in the Case of Corporations aggregate. All who are severally liable ought to be sued and that by their respective proper names 2 S. Rep. 508

Pleas and pleadings -

The christian name of a person is not different -
Now in an action against a person you must describe all the persons composing that person -
This is not true of Corporations - It is true only of natural persons - Corporations must be sued by their corporate name - A corporation is a legal ideal entity - if all the members of a Corporation are named it is bad -
Leach: 244
Formerly it was thought that if the mistake was in the Christian name it was fatal - but if in the Sir name it was not - This fine distinction obtained in Court and it is thought would not now be considered as law in Great Britain -
Stra 1218
4 Bac: 348
3 Bac: 625
8 T. Rep 508
Where a Deft is mis named he need not for his own security take advantage of it, for if he is after wards sued by his right name for the same cause, he may plead the former suit in Bar and aver that he is the same person sued in the former action and that the suit is for the same thing -
1 Com: 14, 15
3 Bac: 617
Misnomer of the Plff - This may be pleaded in abatement this is a rule of the Com: law - - - The want of, or mistake in addition is not in most cases a defect at Com. law -
A Replication by the Deft that the Deft was as well known by the name by which he is sued as by the other name, is good and if it is true or demurred to the Plff will recover -
1 Bast: 542 -
But every addition in the Plff is not pleadable in abatement except at Com. law - At Com law if the degree was as high as that of a Knight he must have
1 Com° 15
6 Mod 85

Pleas & pleadings -

had his addition. otherwise not. The place of abode must still continue be inserted - It is supposed rightly that there is no great danger of the Plff's being mistaken - At any rate the cause of the Plff is within the Stat. Henry 5th

At Com. Law Misnomer was not pleadable to an Indictment for felony - as the person of the Criminal standing at the Bar with uplifted hand was sufficiently certain - This is now altered by Stat Henry 5th because it reaches to Indictments -

In Court the right name must be inserted altho. we have not adopted the rule introduced by the Stat Henry 5th in personal actions - This however can do no good because he is in the custody of the Court, and they will not discharge him but keep him in custody tile another Indictment is drawn - etc to petty offences where the Deft can appear by attorney, it would be of use to plead a Misnomer -

1 Hale 246
2 Hale 176. 238

6 vo Bac 104
1 Burrow 456
2 Hawk 186

II Coverture - Another cause of abatement to the Coverture of the Deft. The general rule is that a feme Covert cannot sue alone and when she does sue alone, she is considered as a feme sole though her husband be actually living -

1 Salk. 132
1 Bac 34 -

But if a feme sole being sued marries pendente lite the suit does not abate on this account because it would be to defeat the suit by her own act - The suit is rightly commenced the right of the Plff has attached and she shall not be able to defeat it by her own act -

1 Bac: 9.10
Bro Bac: 323
Stra: 81. & 811
2 Ld Ray 15.25
Esh beg 328

Pleas and Pleadings -

If a feme covert when sued would take advantage of her coverture, she can do it only by a plea in abatement
Latch: 24
Lutw: 23. 1178
It cannot be taken advantage of by her plea to the action - If she does not plead in abatement she waives her objection -

But a married woman when sued alone does not plead it in abatement - and therefore cannot herself take advantage of the defence afterwards. Yet her husband may come in and plead her coverture in Bar in any stage of the proceedings, and if he does not do this and Judgt is rendered against her, he together with his wife may reverse it upon a writ
B.J. Ref 681
3 J. Ref: 681
Salk 400
5 Com. 198
4 Bac Ab 9. 89
Latch: 24
of Error - The reason of this is. the Wife cannot destroy the right of the husband - by her own act. of course her ignorance of the coverture does not affect his rights so that he can't take advantage of them -

This writ of Error is founded upon an Error in fact - It does not appear on the Record for there is supposed to be no plea of Coverture - This is a Writ of Error coram Nobis or vobis, i.e before the same Court which tried the action -

The husband and Wife must both join in this Writ
Dest. Ref. 16. or 19 —
of Error, that it may be known that she is really a feme covert and a covert of the husband claiming a Reversal of the Judgt -

And it is a good cause of abatement that two Affidavits or two letters being sued as Husband and Wife are not in fact Husband and Wife - Thus if an action is brought vs A. & B. Husband & Wife A is pleadable
Lawes: 105
in abatement that they are not married -

But it is no cause of abatement that the Letters or

Pleas and pleadings

Infant sue & that his Guardian is not summoned to appear as a defendant. The regular course in England is to appoint a Guardian ad litem.

5 Coke 53 b
1 Inst 89. note
Do - 135
3 Bac. Ab. 169
8 B. C. L. 427

Dr. Const. where the Infant has a Guardian appointed by law - or a father who is his natural guardian, he is regularly to be summoned to appear as a defendant as the cause is to give the Pltff time to summon in the Guardian. If the Infant has none the Ct will appoint one ad litem. as the Cts ordinarily do in England.

So the Pltff upon request may have him summoned as judgt would be erroneous if recovered vs the Infant only without notice to the Guardian.

That an Heir who is sued on the bond of his ancestor as an Infant is no cause of abatement nor is it any defence to the action. When he is sued on his own contracts he may generally defeat them by the plea of infancy. But here he is sued on the contract of his ancestor. In this case the rule of the Com law is. that the land shall answer - i.e. have recovery shall be obtained until he attains his full age.

4 East 466
Laws. 105

And in Engd we have a guardian well known to the law of England. Under our statutes the Select men of the Town under some circumstances and the County Ct under others may appoint in one case Overseers. in the others. Conservators to certain persons who are not able to take care of their property. who thus become Guardians and during the time of their Conservatorship - the person is not able to be sued alone.

Hob 176

But here if he is not joined. it is no cause of abatement in the first instance. for the Ct uses in the former case will grant time to summon him to appear and defend.

1 Com. Dig. 5. 6
1 Burl: 139
4 Bac. Ab. 401
10 Coke 134
6 Co. Ri. 94 a

III. Another cause of abatement is the death of parties - at Com law if a sole Plff or sole Deft died pending the suit. it was abated. There was no rule established for continuing it after that time. even if one of several Plffs died. except in personal actions after summons and severance the suit abated.

A summons and severance is where one of two persons having a joint right refuses to join in the suit for its recovery. In such case the other may sue in the name of both. and summon him to appear. and if he does not appear the Ct will sever them and enter it on the back of the Record. when the party prosecuting may proceed as though he were alone. But if in personal action there had been a summons and severance. and the person severed died. his death did not affect the suit.

In real actions there was no execution.

10 Coke 134 a
6 Co: 26
1 Bacon: 7
Th. Ken. 463

The reason for this difference between personal and real actions in this particular cannot be easily understood. It is thus. that by the death of one in a real action. the extent of the Survivors right is encreased. So it is in personal actions. There is a technical reason but it would take too much time to enter into an explanation of it. in this place.

1 Bac: 8
1 Hawk. 186
3 Mod: 249
Hardw: 181

But it was a general rule even at Com. law that if one of two Defts died pending the suit it should not abate.

But in such case the Pltff was to make an entry of the deceased deft and proceed against the Survevor-
If however in such case as this the Pltff should take judgt as both the deceased and the Survevor. the judgt would be void in toto. These were the rules at Com. Law- Carth: 129
But now by the Stat 17 Car II and 8 & 9 Wm 3rd in Engld and in Connt by a similar Stat the inconveniences by the death of the parties are in a great measure remedied. Under the Stats if one of two Pltffs dies pending the suit. the suit does not abate. if the cause of action is such as would survive in favour of the Survevor. as in the case of two joint obligees or where the joint rights of two or more are violated-
So on the other hand where one of several Defts dies pending the suit. the suit does not abate if the cause of action be such as would survive agt the Survevor- 4 Bac: 42
2 Mod: 115
1 Com: 545
Dr either of the cases if the death of the deceased party 11 of Con: 223
is suggested on the Record. the suit will proceed. This must be done else judgt will go vs the. and it will be erroneous.
And under these Stats if a sole Pltff or sole Deft dies pending the suit. it does not abate. if the cause of action be such as will survive to or against the personal Representatives of the deceased.
This rule does not obtain in England unless the death of the 4 Bac: 42-
party happen after some interlocutory judgt obtained.
In Connt it makes no difference. the rule prevails in any 11 of Ct: 22
stage of the suit. tho no judgt has been obtained.
The reason of the rule as it is in Engd I suppose to be. that any
interlocutory judgt supposes both parties to have appeared-

Pleas & pleadings -

In these last cases viz. where a sole Pltff or sole Deft dies - if the Pltff dies the Exor or Admr may enter and prosecute the suit by suggesting the death of the Pltff on Record -
If a sole Deft dies the Pltff the Pltff must do some thing more than suggest the death of the Deft on the Record - he must have a Scire facias agt the Exor or Admr to shew cause why judgt should not go vs him - This difference is perfectly proper & reasonable - It is to be observed however that our Act relates only to suits in the Supr Courts and Cts of Com. Pleas - Therefore before a single Magistrate the rule of the C.L. must prevail -
But there are supposable cases for which the Acts do not expressly provide - Suppose two Pltffs die at different times pending the suit - What is to be done with the suit - In my opinion in the first instance of survivor to the Survivor - in the second place of survivors to the Exors -
Suppose two Defts die at different times pending the suit - the same course must be pursued - If survivors in the first instance agt the surviving Deft or his Exor or Admr - This can only be true when the cause of action survives in favour of agt the Survivor -
In these cases the Exor of the last surviving Pltff is accountable to the Exors of the other Pltff for their share of what he recovers - And the Exors of the Deft are liable to the Exors of the last surviving Deft for their proportionable share of the burden which has been recovered agt them -
Real actions abate in most cases upon the death

of a sole Plff or sole Deft - They remain as at Com law, because the Stat does not affect real rights - The Stat speaks of actions surviving exct personae Representatives not of the heir remainder man or Reversioner - It relates only to personal actions. —

But real actions where there are several Plffs or several Defts are within the Statute - Here it does not mention personae Representatives but the surviving original party - Where the action will not abate by the death of one, if the cause of action be such as would survive in favour of the surviving Plff - in the one case and exct the surviving Deft in the other -

It was decided in the year 1800 by the Superiour Court that petitions for new trials are within our Stat. tho the Stat makes use of the expression all actions - This judgt was affirmed by the Supreme Ct of Errors June 1803 and yet the Stat. was made long before new Trials were known by our law - But the decision seems Mr J. conceive to be correct - The case was Morse et al vs Gaswold 1 Days Reps -

IV. Variance - Another cause of abatement is variance - In the first place if the Writ varies from the Writ it may be pleaded in abatement - It is said that here the Writ itself abates the Writ -

And it is said especially in the Law Books that where the variance is in form only no advantage can be taken of it only in abatement - But if the variance is in substance this plea tho it may be made is unnecessary for judgt may be arrested after verdict - or the Ct ex officio ought to dismiss it -

In Wilsons Reports however the Chief Justice intimates

1 Bac Ab 692
1 Swift 179

yelv: 5
1 H. Bla: 219
4 Bac: Ab 46. 4 -

Cro E: 121
Do - 865
198, 722
yelv: 120
Hobt: 279 -

2 Wils 394

4 Mod 246 Salk 48 Do 68 — That the latter branch of the rule as to the practice for the variance he says must always be pleaded in abatement. and his opinion seems to be supported by others.

A Variance in point of form consists in such mistakes as those of giving the Left a different name addition &c in the Writ from that in the Writ. Variance in point of substance consists in giving the Plff a different Title, quantity of Interest in the Land from that in the Writ.

Bonj: 640 Hard: 84 6 Bacon 14 2 Wilson 202 Lewis 106 2 T. Rep: 314 Do — 612 1 Bos & P. 67 1 T. Rep 636 — Again, a variance between the Instrument sued on and the description of the instrument in the Writ is a good cause of abatement. Thus if the Writ states a Bond of 100£ and it is found to be a Bond of 50£ it is a variance pleadable in abatement. These variances as your Honors see are numerous. If there is a Misdescription it is a variance —

1 B & P. 656 Bonj: 640 1 B & Pull: 7 Bonj 166. 7 — But if the variance is between the Instrument on which the action is founded and the description of it in the Declaration the usual mode of taking advantage of it is by pleading the Gen. Issue and objecting ~~to it~~ to it being given in evidence to the Jury and thus making a Non Estoppel.

On the other hand advantage is taken of it by a plea in abatement usually. Thus altho, it is not necessary may be done. It may be taken advantage of here in the same manner that it is in England — It is said by Comyns and I presume it is law. that this may be taken advantage of in England by plea in abatement —

1 Burn: 44

Plea and Pleading.

With regard to this kind of variance, advantage may be taken of it in either of three different ways. 1st By plea in abatement. 2nd By objecting to its being given in evidence under the general issue. 3rd By praying oyer of the instrument, placing it on the Record and then demurring to it. — 1 Lawes 51-99.

But the Narr cannot be demurred to. After putting the variance on the Record. after oyer, even all the objections which can be made to this must be made to the Narr particularly and what ingenually appeared upon it. But the Narr is good before any Oyer. and this cannot vitiate that. — 1 Saund 154 note: 287- B.C.P. 313 Doug: 208. 213 2 Stra 1146 2 Bulst: 339- Kirby 136.7-

Misnomer as such must be pleaded in abatement. But if on a written instrument misnomer occasions a variance, it may be taken advantage of, as a variance. But then it is not treated as a misnomer but as a variance — 4 J.R. 612- 16 J. 656-

4th Another cause of abatement is the non-joinder or misjoinder of parties. Under a former division of this subject I considered what things might and what might not be joined in one Narr and also what parties might or might not be joined in one Writ. I am now to consider the ways in which advantage may be taken of these defects —

It is a general rule, if one person sue alone where several ought to have been joined with him — the non-joinder is always pleadable in abatement. I am now about to consider the non-joinder and misjoinder of necessary Plaintiffs — 1 Prest 164 a 189 a 195 a 198 a

Pleas and pleadings -

Cro C: 143 - Hobt: 72. 1 Com: 13 - 1 Mole: 214 - This general rule extends to all cases of torts as well as of contracts in fact to all actions whether real personal or mixed - Thus if one of two joint tenants bring an action for an entry alone to the ft tenancy - the omission of the other is pleadable in abatement - so of joint obligees promisees &c as sometimes in case of tenants in common - as therefore on the other hand - where there is a non-joinder the mistake is pleadable in abatement - so on the other hand, if several sue where the right of action is in one only - this mis joinder is pleadable - If A executes a note B. and B & C bring an action upon it. A may plead in abatement to it -

Hob: 72 - 1 Leon: 315 - 1 Com: 13 - This rule you see is general and extends to all cases - viz that the mistake may be pleaded in abatement - But further in action on contract either one sues alone it may be taken advantage of under the Gen: issue as well as under a plea of Abt -

On the other hand if two or more sue on a contract where the right of action is in one only - advantage may be taken of it in the same way - he may plead in abatement because there is a Mis joinder and he may take advantage of it under the gen issue - because the contract sued upon is not the same deed upon - The evidence does not support the Record as where P.S - makes a cont with A only - A and B bring an action on this Contract vs P.S. The averment that P.S. made the cont with them both is not supported and therefore advant - may be taken of it under Gen: issue -

1 W.C.P. 75 - 2 J.R: 282 - 1 B&B. 152 -

Pleas and pleadings.

The deft may also in this case take advantage of the non or misfeasance in any other way. He may pray oyer of the Cont. when it is a written one - place it on the Record and then demur &c. This is only true of written contracts for you can not pray oyer of a verbal Contract. This can be taken advantage of only in the two ways before mentioned

113 & 8. 67-
1 Denio 153-
291-6 & 9-
note -

April 17th, 1913. Criminal Law. - by hon Zephiny Reeve -

A Crime is deem'd to be an act ~~to be~~ committed against the law. it is omitting what ought to be done or doing what ought not to be done - This may be either Statute or Common law -

Misdemeanor is a transaction injurious to Society - but which has no particular name - but this may be a very high offence as an attempt to Murder. is a misdemeanor - to this where a Statute is made forbidding a certain thing to be done but inflicting no penalty - this thing if done is a Misdemeanor - it is a breach of the wholesome regulations of Society -

In most crimes there is a private wrong - In some of these there is no remedy for the private wrong - and in some there is - In the former cases the private injury is deem'd to be merged - and these are crimes that amount to felony - which forfeits a mans goods and chattels - and is always punishable with death - This says, they cannot exist in this Country - they cannot a man recover from one who has committed forgery e.g. - In England by these crimes & more

be outlawry - for he has forfeited his property and his body to the public - Thus there accounts for the rule of Merger - which the Judge is more metaphorical language the real ground is that there is no remedy -

But the Judge thinks otherwise in this Country - for here we have no forfeiture of goods and Chattels generally - and thus there is no reason why action may not be maintained -

Those which are called Mala in se - are such which would be so if there were no Society - and Mala prohibita are against the provisions of Society. Thus to bury one in linen in England - is a malum prohibitum - for the law enacts that all dead shall be buried in Woolen -

The Judge thinks not much of the doctrine of implied Consent to abide by the laws of Society - The Judge says if a man lives in Society he must abide by its regulations -

The grand object of Criminal law - is not reformation but to deter others from offences -

There are crimes by Com. law - and crimes by Stat - and there are many which

are crimes by Com law and are made so by Stat- The object of ther is to give a cumulative remedy- The Officer of the public may indict on either the Com. law or the Stat- and the punishment is according to the law on which he was indicted- Besides the Stat sometimes introduces different rule of evidence- and if the action is barred by the Stat. it may still be good at the Com law-

The rule in civil cases is analagous to that in C.L. In some cases Stat gives treble damages for trespass- but then the trespass must be wilful, and if plaintiff fails in proof of the wilfulness- the harm is still good at Com law-

If the Stat. makes a punishment for an offence less than at Com law- the Stat. supersedes the Com law punishment- But where the Stat increases the punishment it is optional with the public officer to take either- the Com law or Stat. punishment-

Who are exempted from punishment-

In order to constitute a crime there must be a wrong intention and

Criminal Law.

Exempt from [illegible]

an act in consequence of it - and there must a concurrence of the Rele with the crime. This short then is the criterion -

Where the person labours under a natural disability - there is no crime - as where law says a man shall go to certain place and he has no legs -

Where there is an improper necessity there is no crime -

But suppose there is a concurrence of the Rele - yet there may be such a defect of understanding as that there not be no crime - It may be wrong in foro conscientiæ it cannot be punished by law -

In all cases then where the man is a mere machine or instrument - or where there is a defect of understanding he commits no crime -

A person under 21 is as capable of committing crimes as any body else - i.e. after he has arrived at 14 - Between 7 and 14 they are liable if they can be proved malicious, the maxim being Malitia supplet ætatem - From Infancy to 7 - there is a presumption of law that he has not understanding - Thus the principle above laid down is regulated -

Criminal Law - Witnesses from p. 1

Idiots having no understanding can commit no offences -

With respect to Lunatics it is always a matter of enquiry whether they had understanding or not at the time of the crime committed. When the fit is on they can commit no crime. But the they is left to the triers to determine whether they could distinguish right from wrong -

Intoxicated persons although they are like mad men are punishable for crimes committed by them - This goes upon a ground of policy - It is said that this is a madness which a man brings upon himself - The Judge, Chief Justice, their reason unsatisfactory - for while there is a want of understanding. It is a mere pretence of policy -

When the thing done is not intended to be done & the Mind is perfectly neutral and there is a crime - But on this subject there is a distinction - When the fellow is about an unlawful act as where he goes into A's lot & shoot his horse - and breaks the leg of A's mare - he is guilty of a crime

had such threatening been use against his mother. This is founded on policy. To guard against offences. for an unlawful act he must bear the consequences. but policy does not require that he should answer for the consequences of pursuing an unlawful act.

Ignorance of fact excuses a man. as when in night time. A mistakes one of his family, for a robber and shoots him.

But ignorance of law is no excuse. you must go upon the ground that as the Citizens know the laws of a State after they are published. so too when the Criminal that the punishment was one thing and the law inflicts another there is no excuse. Since here again policy operates.

Obligations of Civil subjection must be regarded. as when one duly established by law. a man cannot be punished for committing it.

In cases of Compulsion by a superior as a Servant by a Master there is no excuse. There is but one connexion in life that will excuse and that only in some cases and that is husband and Wife.

Criminal Law. Principals & accessory.

There is but one case where the wife when she does the thing with her husband is liable - and that is where they keep a Bawdy house.

So compulsion by an Enemy to give provisions to carry them a mountain &c. &c. there is no excuse.

The case of stealing to satisfy hunger has been much canvassed about by Casuists - The Law however knows no excuse about it.

April 19th

Principal & Accessory.

The principal is the perpetrator of the offence. an accessory is one who gives encouragement to the perpetration of it - or he may give relief or assistance to one who has perpetrated. and then he is accessory after the fact.

When a person is present aiding and abetting the offence, he is principal -

Hale 1. 615
Foster 350

What is presence. There need be no corporal presence - as where B. watches while A steals.

There are crimes which may be committed without the presence of any body - as when one poisons another - or turns out

Criminal Law.

Principal and Accessory

a mad Bull. Where he is a principal.

An Accessory is either before or after the fact.

Any one who procures the thing to be done by his advice or command or sets on foot the mischief is an accessory before the fact.

Although standing he may not be accessory to all that happens to be done in the case. The distinction is then if the injury is greater than the one he advised & yet if it is the consequence of the injury he advised. he is accessory. As where A. advises B to come C. B comes C. so that he dies. A is accessory to the homicide. But if B has robbed C. A would not be accessory.

Hale: 615

Accessory after fact. No person is by law allowed so to aid or assist a person who has committed a crime. as to escape the punishment of the law. and he who does so is accessory after act. Thus giving food to a felon who has committed a crime is to be accessory after fact. But where the Criminal is in jail. because then he cannot escape punishment.

2 Hawk. 319
Hale 620

Criminal law - Principal & accessory -

The crime must be complete to one be a man. accessory after the fact. A wounds B. so that he dies. but before the death of B. C. assists A. So he is accessory after fact. There is no doubt but that if B had been dead at the time of assistance rendered he would be. But in that case he is not accessory after fact for the crime is not complete.

There is no connexion but one in society which will make it a case and one of is taken. and that is husband and wife. this is called conjugal infidelity. 2 Hawk 320 1 Hale 621

Treason and Treachery - the highest and lowest crimes in society. - allow of no accessories - all are principals -

Unpremeditated crimes have no accessories - as manslaughter -

At Common law the punishment of accessories and principals are exactly the same the reason of the above distinctions is that some states have made a difference between principals and accessories as to their punishment.

The law will not permit an accessory to

Criminal Law. Parsefal et al

be tried before the principal is tried and if he is acquitted there are no accessories -

Foster: 361
Hale: 625

They are different offences - for if one man is indicted as principal and acquitted he may be afterwards indicted as accessory - A man cannot be tried twice for the same crime but he can for the same matter

Poll. I will proceed to consider particular offences and shall only give you the Com. Law - for the alterations Refer you to the Statute Books. -

We denominate felony here all that they in Eng. call felony but what constitutes felony does not exist here - Whatever at Com. Law works a forfeiture of goods and Chattels is a felony - In this Country we have no forfeiture -

Anciently a Clergyman was not punished the first time - that if a man could read the presumption was that he was a Clergyman - the next presumption was that every man could read - so the offender had only to ask the benefit of clergy and he had it. In the Reign of Queen Anne this benefit was extended to females -

Criminal Law - Arson -

Arson -

This is an offence at Common Law. It is a wilful and malicious burning of the house of another. The word wilful excludes burning by mistortune &c. The word malicious is used here as it is ever in the law - Any improper motive constitutes malice. It is better expressed by the word Malitia. It must be the burning the house of another. If a man burns his own house it seems is not arson.

If a Man burns a house not inhabited it is not Arson - but if it was sometimes occupied - as a domicile it would be Arson. To set fire to outhouses under the Carolege is Arson - By Statute to set fire to a Barn filled with grain it is arson -

In Canada the burning of a Mans own house is arson - and indeed at Com law if a man set fire to his own house and by that means burnt another - this is arson -

But when the animus malus - is manifested it is arson if by burning his own house he burns an others - and where he sets fire to his house and knows that by that means he necessarily must burn his neighbours -

1 Hawk 105

1 Co: 20 - 4 Bac: 221 1 Hawk 166

Cro Car 377 1 Hawk 166 -

Criminal Law.

Arson -

There has been a question whether when a man leases a house the lessor can burn the house and not be guilty of arson - the 1 Bac 291 Statute says it is arson and another not. The Judge says it is the lessee's demesne and it is arson -

This burning of the other things concurring is the least culpable burning. It has been said that it is not arson when A intends to burn B's house and sets fire to C's that is only a misdemeanor - But says the Judge the malus animus makes it arson in this case -

The punishment of this kind of Act is death - In Count the Common punishment remains as far - that it is death where life is endangered short of death (Stone Gate) where it is not endangered -

April 22nd -

Burglary -

This is the breaking and entering a Mansion house in the night with an intent to commit a felony - i.e. a crime which would be punished with death in England -

There must be a breaking.

It must in the night - at common law - If the act is

Criminal Law — Burglary —

committed when there is light of the sun enough to distinguish a man's face. It is not Burglary.

1 Coke 6-64
Moor 660
1 Hawk 160
Bro C: 543 —
9 Co: R: 66.

The place must be a Mansion house. The Judge says he should be charged. for Lord Coke says it is the Mansion house of God. It has been held to be Burglary to break a Church with intent &c

1 Hawk 162

It is not Burglary to break a house not inhabited but otherwise if it is sometimes inhabited. But no other house is a Mansion unless it is in the Curtilage — Buildings near by and adjoining the house are considered as part of the Mansion. To break a shop was not Burglary at Common Law. It is however made Burglary by statute Count This has been extended so far as the breaking open of a School house and a Chapel. and carrying off property. The Judge does not think this was contemplated by the Legislature. When it is the Custom to sleep in a shop the Judge says the weight of authorities is that even then it would not be Burglary at C. Law.

2 Coke 40
1 Reeling 27.
52
Topham 42

It must a breaking — To constitute the breaking the door must be fastened. To enter the door when open in the night time is not a breaking. It is a breaking to lift the latch.

Criminal law.

Burglary.

Hawk P.C. 92.63 Bulton: 20. Cro Car 65 Do: 225

If a man should come down a Chimney in the night season it would be Burglary - for that cannot be clos'd -

Altho a man should get in without lifting a latch yet if he obtains by fraud it would be Burglary - for fraud always vitiates - as where a man knocks at the door in the night and is let in this is Burglary - but otherwise where a man getts in by means of a Constable &c -

There must be an entry - and it is no matter how particular this entry is - one foot over the door sufficient - And Held where a man broke a hole thro a window and put out the hand he is entering - And further where unlocking has been held an entry - This is going some length

Hawkins 111 Where a man put a pistol thro a window but not his hand - under demanded money - was held Burglary -

Hawk P.C. 84 All persons concerned in this business confederates watching without are present. Where a Confederate within opens the door is Burglary -

Hawk P.C. 83 Hawk P.C. 84 It must be with intent to commit felony There must evidence of this intent - The thing

Criminal Law. Perjury

1 Hawk 164

intended to do, when done must be felony — The Prisoner was Counsel for a Black man who was indicted for Burglary. the prisoner proved that he was after a Black woman — he was acquitted.

If a person should be in the house and steals and breaks out. this will be Burglary if the object of his staying in the house can be proved to have been to steal.

The punishment by C. Law is death without benefit of Clergy — Pin Court Newgate by Hal.

Perjury —

This is a false swearing wilfully. it must be in a point material in the case — and by a person under oath relative to some proceeding in Court. the oath must be administered by a authorised person —

1 Hawk 390
3 Mod 330
10 Mod 195
1 Salk 514

It must be wilful. If a witness to be mistaken or surprise it is not perjury. tho it may be false in fact — there must be an intent to do wrong

Farmer 292
3 Mod 222
1 Hawk 432

It must be false. by this is not meant that it must be false in fact — there must be some thing more. Where a man swears to a fact of which he is entirely ignorant this is perjury — Falsely applies to the mind.

Criminal Law.

Perjury.

It is as much perjury to swear according to his best recollection as to swear positively. It must be on a point material. The only reason why there is an object in view if he swears falsely on a point not material it should not be perjury.

1 Salk 514 — 1 Show 8 500 — Carth 122 — Parr K: 382 — 1 Raym 324

If the Witness makes a long preface with a view to obtain credit and it can be proved to be false. It is perjury.

What is that constitutes a material point? If it can be used to prove the case it is material. even tho by doing it would prove nothing.

2 Ld Raym 1538 — 1689

It must be relative to some proceeding in a Court. If they respect any matter in a Ct it is perjury as deposition. It was held formerly that they did not extend to Arbitrations. But see us now. they are held a Court.

1 Vent: 319

Affirmations of a private nature are not perjury. It must relate to some proceeding in Court. An oath of office is not perjury.

Cro E: 168 — 2 Rol - 807 - 1 Sid: 609

It must be administered by a person authorised to administer. Where an Arbitrator administers an oath even where it is by Court it is not perjury.

1 Vent: 169

There has been a question whether an oath administered by a Ct having no jurisdiction

Criminal Law. Forgery-

is perjury - Modern cases have determined it perjury -

Where a party himself swears he may be guilty of perjury, because he is so far a Witness -

This offence was once punished by C. Law with death - This has long since been put away - Afterwards it was Capitable. But now fine Imprisonment and pillory at the discretion of the Ct - is the Com. law punishment - followed by a disqualification to be a Witness ever after -

In Court Stet gives to the party a sum of money from the person perjured besides fine &c at the discretion of the Court - April 23rd

Subornation of perjury is where one endeavors another to swear falsely. The punishment is the same but the form of the indictment is the different

Forgery at C law is the making of Hawk's 3 35
or altering any record or matter of a public nature or any deed with intent to prevent equity and justice It must be matter of Record - Under this head are included Parish Registers Marriage Records these are matters of a public nature -

Criminal Law.

Forgery.

Bro B: 296
Do: 353
1 Rolle: 66

Deed Wills &c. may be forged and there are all that can be forged at Com Law. Statutes have made alterations on this subject

Moore 655
Do: 759
1 Hawk 336

A sells to B by deed. he then sells to C and ante dates the deed to C. this is forgery. - the antedating renders it a forgery.

A man employs another to write his Will and gives his directions. and the man puts in a legacy to himself. this is forgery.

3 Hawk: 66
& Mod 102

So where A signs a man's name on the back of a paper and a power over any instrument and seals it. it is forgery.

By any that and most of the Statutes they have much extended the Pr Comm they have extended it to all writings

The object must fraudulent. This fraudulent object is sine qua non. Where a man made a Bond to B for 600£ when he intended only for 500 marks and the obligee altered it. it was held no forgery. Where a man gave a note of hand payable on 1st June in beef cattle, fat ones. the payee knowing, altered it to neat cattle knowing that there were no beef cattle on June. the Judge was respectfully defended therein and it was held no forgery. &c.

1 Hawk 337.

Criminal Law- Forgery. Theft

If it is essential to forge that there should be a positive act done. it is as forgery - one the other hand if the omission alters the note materially it is a forgery. The Judge thinks it is on the grounds of forgery -

If a man writes a Lords letter over an others name this is not forgery - for tho it may do mischief yet it does not prevent equity & Justice - The quo animo must be ascertained -

The original punishment at C. Law has ceased. which was fine and imprisonment - and pillory. Now by Act in Engd it is death - In Scotland it is New Gate - The only last have taken away the Com law punishment -

Compound larceny is excluded from benefit of Clergy - at C. Law. Simple larceny is in common parlance called theft - and is divided into Grand & petit Larceny - the former has benefit of Clergy. and is punished with death at C. Law Petit was where a man stole less than 13^d. which is now equal to 30 shillings. of course mens lives have been cheap enough - The Barons formerly when they invested to a grant a man found the value of the horse. 12 Di - This distinction is done

Theft.

away. Theft includes both.

Theft is a felonious taking and carrying away by any person the personal goods of another not from his house or person. The Judge says it ought to be not from his house in the night season.

It must be felonious i.e. animo furandi any other taking away is not theft. as where a servant takes his master's horse & rides to a public. The quo animo must be ascertained. If a vagrant takes a horse and rides away with him. then is theft. but if he says when he rides 5 Miles and then leaves him.

If property is bailed to a man and he then steals it it is not theft. but otherwise where the Bailee intended at the time of the bailment to steal him this being a mere trick & shall be theft.

In Lead C.C. there is a case of this kind. A number of thieves knowing a man had a large sum entered into conversation with him. one of them picked up a brilliant stone and said it was a diamond. then went to a Jeweller who was known and he declared it to be a diamond of the first water. The pool bought it. The fellows were indicted for theft and executed.

There are however some cases which pass
ble. as when you deliver cloth to a Tailor or
goods to a carrier and the one embezzles the
cloth and the other steals the goods. Here
is a bailment and how do they differ from the
other cases just for the cases in books there is
not theft. They have a lien upon the article delivered
to him. like he is a carrier. Besides there is a hen a-
of necessity here. you must go to a Tailor or to a
Carrier. there is no choice —

1 Hawk 112
Keeley 33-
2 Bl 472
Moore 466
Roh! 84
Hale 504

Persons with whom you contract and
whom there is no property vested. may be guilty
of theft as Shepherd to whom sheep is delivered.
& steward over goods.

If A steals from B. and C steals
the same property from A. it is settled that C
steals from B. for A never had any property.

All crimes are to be indicted in the county
where they are committed. But in the case of
stealing it may be tried in any county where the
thief carries the property for every moment he
keeps the property he commits a fresh theft.
Thus if he should be pursued and get off the horse
before he leaves the county and he is taken in
another county. he cannot be tried in the
last county.

Criminal Law. Theft

1 Hawk. 124 There must be a carrying away - and the least
amotion is enough - but there must be some
amotion. Thus where a fellow took a book
out of trunk and laid them on the floor
this is a motion enough and amounts to theft
So where a man steals sheep but does not move
Keeling 319 the fleece - this is theft

Where a man was caught in the act of
raising the Bale of Goods on the end & was
doubted by Court whether it was theft - but
on principle says Judge it is theft -

It is clear that if a thief steals from her
husband and delivers the property, & another
not taken it animo furandi that then
is not theft. The Judge does not believe that
the thing must be personal. Thus to take
emblements - apples from the trees is not theft
for this is a trespass - And if cut down trees
and carry them off immediately is not theft
but if lies where they have laid long enough
to settle into personal property. These are
artificial distinctions but they exist. -

April 24th

At Com. law. theft cannot be committed of
1 Hawk 142 & Co: 33; choses in action tho they are personal property but
1 B. & C: 264 in England and in some states they have made it pun-
ishable as well as theft. At the time this was the

Criminal law. Piracy

the C.L. there were not negotiable. And this being the law a question arose whether Bank bills could be stolen. i.e. whether A was guilty of stealing in any & some states. The Judge thinks A is guilty for Bank bills are always considered as money - as currency - even when there is not stat. and that the stat is only in affirmance of Com law.

So the mere creatures of wheels and fancy as Cats dogs Monkeys - is not theft. there is mere trespass.

There is an invasion of an important right which is not property - i.e. where men have an exclusive right to fish in a river by grant or otherwise. Now if another takes fish there it is not theft. It is a mere trespass. But secus where one takes fish out of another pond. The fish in the former case do not belong to the proprietor of the fishery tho they are taken in the case of a pond — 1 Hawk 164

A man may steal his own goods as where he takes goods he has delivered to Bailee who has a lien upon them — Cro E 586 1 Hawk

~~Simple larceny~~ —

Piracy - includes every species of ~~felony~~ depredation or robbery on the seas. that amounts to felony in any of the

Criminal Law — Riot

1 Hawk: 182
4 B. & C: 71. 2
2 Rood: 431

aforementioned cases — with the exception that if it is done by three or more of the people — that it is called an Assembly & matters not whether it is done openly or secretly by violence or fraud —

This crime is very much punished by the law and is punishable with death — In all the nations of Europe the Culprit is tried in a Court of Justice without Jury — but it is otherwise in Engd. and in other Country where they are tried by the Country —

Mallory —

I shall now consider those crimes which include a breach of the peace —

Riot is a disturbance of the peace — it must be done by three or more — assembled together of their own heads having some object in view since determined to desist — This object must be of a private nature — and must be actually executed — and that with violence and it matters not whether the act is lawful or not —

It must be a disturbance of the peace — it must be by three or more —

2nd of their own heads &c — It is not necessary to start from home with a view to the particular — thus if a man comes along and joins a body of men who are about pulling P.H. he is as guilty of riot as any of the rest —

1 Hawk: 138
4 B. & C: 146
6 Mod: 43
2 Salk: 593
2 Hawk: 234

Criminal law: Riot. Rout

An enterprise and act of a private nature i.e. against some private property or person. for if it is against the public it is a higher crime 1 Lo: Ra 484 1 Hawk: 196 1 Hawk: 295

They must actually execute it. for if they do not it is another offence.

It must be done with violence. Where a party rides thro town with fifes arms &c. they not a riot — for here is no violence — and the violence must be such as to inspire terror. 6 Mod: 171 3 Burr 1263 Hobt: 41 1 Vent: 369 380

It is the same they whether the enterprise is lawful or not. As when A keeps B. out of his lands. and B. forcibly enters with his friends he enters in a riotous manner. Private good must yield to the public. the law offers a remedy to B. in this case —

3 Mod: 5 2 Show: 235 1 Hawk: 296

A Rout is the same offence as a Riot. with the difference. that they need not execute it — it is sufficient if they attempt it. An Indictment for a Riot always includes a Rout. and so the Culprits may be found guilty of a Rout. when they are indicted for a Riot —

An unlawful assembly. is the same thing as the above. except that they neither execute nor attempt their object. But they must have all the other qualities of a Riot. The case of the armed men. above is an unlawful assem-

1 L.R. C. 166. 1 Hawk 294

Unlawful Assembly, affray

bery –

Robt 92 / 1 Hale 544 / 1 Hawk: 369 380

But there may be an unlawful assembly when they do not meet to commit a Riot or Rout As when they meet together to devise ways & means for a future Riot or Rout –

6 Co: 91 / 7 Mod 11b

But when several persons meet together to defend a man in his own domicil, peaceably and so as not to endanger terror. it is not an unlawful assembly – It is always lawful for a man to assemble his friends to defend him in his house. and they may do for him what he might do for himself –

Any Public officer without a Warrant

Pop: 120

may use his authority to Quell these Riots & and may call out the posse Comitatus – For Lord it is made the duty of the Magistrate to read the Riot act on such occasions which subjects them to heavier punishment if they do not disperse – And indeed any private person may Quell such disturbances – He com- mits punishment was first inflicted by the Riot –

1 H.B. C: 145

An affray may be committed by one, and differs but little from a battery – An affray must be done in view of persons. A battery may be done not in view of people – Thus disturbance from is done and from –

Criminal law.

Breach of the peace.

April 26th

It is a breach of the peace to act in a tumultuous manner to challenge to arms of such or so. For these there are fines. It is not however true that every challenge is a breach of the peace. There must be an alarm excited. If one dares out another to fight it is a breach of the peace. There is some difficulty in drawing the line but there must an alarm excited. For a mere challenge, there is no action but assault, where there is an attempt or an actual blow.

For Any injury that arises out of a Riot Rout the party injured has a remedy independent of the fine there incurred in all cases except for a felony. The reason of which has been before explained. In Private actions for these injuries there is a fallacious argument often used to enhance the damages that there has been a gross violation of the laws of society. But this is altogether fallacious for there is no possible connection between these. Vindictive damages in these cases ought not to be recovered. There is some propriety in using this argument where the law does not punish the offence except by action as in case of Slander &c.

Barratry.

A person is a Barrater who vexes others with unjust frequent and vexatious suits. 1 Hawk. 384 2 Bl. C. 134

he is a Barrater who urges others to do the same.

Criminal Law.

Barratry.

In the former case one undertaking without just cause will not make a man a Barrator. But a second will. In the latter case one instance of stirring up another will connect another.

It must be apparent to make a Barrator that it was his object to sue and that he had no right to recover at all.

If a man engages in a law suit in which he believes he could recover all tho it might be in good conscience it would not be Barratry.

For one vexatious law suit a man may be only acted on in a law suit but this would not amount to Barratry.

When a man makes use of the law as a cloak for vexatious purposes as where he lays his damages exorbitant, so that he cannot recover but this is as much an offence as if he had no claim at all.

When a woman had been slandered and tried an action but had no recovery, and was then sued for a vexatious law suit. The Judge does not think that ought to be considered as a vexatious law suit but Court of Errors & Court decided different.

The punishment when convicted of the suit of the public for Barratry to besides fine and imprisonment amounts to a conviction of the crimen falsi. This is a consequence of the Judge. In Court they compel the man

Criminal Law.

Champerty

by Stat. to give sanction for his future good behaviour ~~by Stat.~~

Champerty

This is an offence at C. L. and is the buying up of other people's rights or grounds. At C. Law it includes the buying up of any security, on which an action can be founded - but this law has gone into disuse. But now if it is done with the view of buying others grounds. It is Champerty. This is in case of Bonds and Notes not negotiable the generality tells whether Champerty or not.

The Com. Law has not altered in the least except in the case of a transfer in the course of trade and these transfers the law will protect. It also where a man buys up from pecuniary motives at a discount with intention to sue - But this is a point this holds for some thinks it is not Champerty.

1 H.B.C. 133 - 1 Wash 363.

There is one species of Champerty which stands on different grounds and is the buying up pretended titles - titles to lands. This does not mean void titles for to buy good titles is the same.

Where one is in possession and claims it by a title of another claims it by a distant title the latter cannot sell his title to any body

Champerty

Glanv: 80. 88.

Lent the man in possession - and if he dies he is guilty of this crime, this is an offence at Common law for then the purchaser had no title at all - it was void - and the man was punished with fine. Besides there is an Eng Stat on the subject and this has been explained in some Notes - By this Stat. the party selling the title besides the fine - has added a forfeiture of half the value of the premises there is a mere civil return punishment - This was passed in Hen 8th reign -

A question of great magnitude has grown out of this viz. whether a Mortgagee being out possession can convey his title to another than the one in possession. The purpose thereby a mortgage is not within the Statute - it is merely personal property - suppose a man makes a Will and gives his Mortgages. to A - they vest as personal property - without any thing respecting the Will - Besides under the terms Lands tenements & Mortgages vest not pass - except where they is no other land - This was decided in Connot that the Mortgagee could convey to the Mortgagor A settlement purchases a Widows Mortgages as much as her dower and notes - Does not her land - It is therefore only a personalty -

Criminal law. Usury—

Usury—

This is a crime— and is of two kinds— one is when a man reserves on his obligation more than he lends— this not not an offence agt the public— but avoids the obligation The other species of Usury is receiving too much— and this is the crime which is punished by the public This species of Usury does not avoid the note— for that is good— You never can rely on a man to the penalty tho he has received too much— and the note is always void when too much is observed—

Com. Dig. Usury Usury

But a man may lose his note and subject himself to the penalty likewise— April 27th.

It is a question yet to whether if a man lends money upon a premium the receiving that premium consum mates the offence— The Judge thinks there is reserving too much— the premium is nothing— the obligation is void. and the penalty is not committed. There have been different opinions on this question in different States—

There have been questions whether it has been outlawed— That runs from the time when he received too much—

Libel-

This differs from slander in a variety of things. A libel must be written or printed or it may be by pictures signs. Every thing is slander is a libel but not e converso.

2 Bish: 403

It is no matter whether a libel is actionable or not. Any words that tend to render a man ridiculous are a libel. In the private action you can prove the words to be true.

A libel of a private person and a libel of a public one are entirely different. Libel now speak of a libel as to a private person. In this you cannot (when prosecuted) give the truth in evidence. But you must in an action for damages. When a man is prosecuted for a libel. it is for the public and not for the party. and the ground of the liability is the tendency of libels to disturb the public peace.

As to libelling the Administration of government the Judges thinks some bad law has been introduced by many. The Judge thinks the truth of facts may be given in evidence. The principle they can come for is. that it tends to bring the government into disrepute. This does not mean the Judges disapprobation. for no public measure

in the extension of this principle could be sanctioned. If he draws a perfect inference from proofs, there is a mere matter of opinion -.

What then is a libel at the Government to charge them with unworthy or corrupt motives falsely is a libel -

In this view of the subject the Law respecting most of the Statutes that the truth could be proved, are unnecessary - -

The clause in the Statutes that the truth might be given in evidence is only in affirmance of the Com: Law -

1 B.C. 150-
17 Howl. S.T. 2

Fine and imprisonment, and pillory are the Com: Law punishments for this offence -

There is another species of libel which is a libel upon virtue as Indecent Books &c - and those which recommend certain vicious practises such as tend to seduce young people from the path of virtue. - This libel must be published for the offence to then is not committed -

What is a publishment? Where A wrote a libellous letter to B - this was held a sufficient publishing. It is said that every man that spreads or sells a libel is a libeller. But this must be understood with some qualifications - If the object

Criminal law

Adultery

Cheating

is to dispense the Slander there be published
of -

Cheating. or as it is commonly called
swindling - is sometimes an offence - not always
When a man makes a bargain out of you - by concealing
facts - there is not a public offence - But when a
man makes use of an artifice - as where a man
rides about the Country well dressed - and col-
lects Gypsies - with a view to obtain credit - there
an offence - If a man sells by false weights
this is punished with fine and imprisonment
and the person is to give sureties for her future
behaviour -

Adultery - in Engd is not punishable
at Com: law - it was only punished by
excommunication in the ecclesiastical courts -
which carried with it many civil disqualifications
In this Country where there are no Ecclesiastical
It is not an offence which can be punished
by law -

The Legislature has made only Adultery
Adultery which is committed with a married
woman. The punishment is that of the old blue
laws - which is the party is branded in the forehead
with the letter A - and that he must wear a letter round

Criminal law-

Bigamy-

Lis me ko-

Bigamy is an offence at Com law and is punished as such. The first law on the subject punished a man with death - then is done away. In Connt they punish it as they do Adultery. Where a husband is absent seven years. his repe may marry again - the presumption is that he is dead -

April 29th

There is an offence made so by an statute that in Engd and is believe coprehended in the statutes of the Union. or if they have not it has become law by usage independent of that. The offence Speech of is forcible entry and detainer. The Com law knew nothing of this offence. So that if a man had got possession of another real property. he was guilty of an offence and subject to the C. L. punishment of fine and imprisonment.

It must be real property such tenement. as lands to endure terror. Folks or no title makes no difference - Forcible detainer is like- wise an offence. as where one is in possession of property he does not own. and resists an entry by the law full owner. - If a man holds over. he may defend against a forcible entry for he is a tenant by sufferance. - The object of the stat. is to enjure whether force was used - it does not affect the title -

Co: Litt: 257
1 Sta. 144 &
2 Bl. Rep. 1314
Cro. J. 199.

Criminal law. Treason

This is a mere law of policy and has no respect to the rights of the parties. —

Treason.

There is a great deal in the law on this subject with which we have nothing to do. But there are two cases of treason in the English law which require attention.

It is treason to levy war in the kings realm. It is certainly treason to attempt to overthrow one State against the Union, but whether it is treason against that particular State has been a question. The Judge thinks it is against the Union.

What is levying war? It is either an attempt to or actually raising troops to change the form of government or to compel the administration to remove what they call grievances by force. — Lord George Gordon's Mob was an instance of this and was treason so long as the Government has power to resist their application by force. It is treason.

But if there is no such object in view altho there may be fighting &c it is no treason. It is said it must be of a universal nature. It must be universal as to the particular object in view as where after the toleration act it was attempted

to pull down all meeting houses. It was contended that to make it treason. It must have been an attempt to pull down all churches. But the twelve Judges held contra.

To give the enemies provisions arms or intelligence is treason. It has been contended that when a Rebel flies out of the kingdom that it is treason for his Relations to furnish him with Comfort. But the Judge thinks this is not treason and so is now the law. King vs Gordon Comb. 1 Hawk. P.C. 37 1 Hale 182 Foster 211 214 - 216.

Treason is very undefined at the Com. law. The Stat 25 Ed. 3d defines treason but many things may be treason which are not there defined. It has long been settled that it is not treason to obey an usurper as in the wars of York and Lancaster - Cro Car 156 Foster 198. 1 Hale 116 - 1 Hawk 3 35

Words never constitute treason nor does writing unless it has been published -

There is some difference as to the proof of treason - We are told there must be two witnesses to the overt act of treason - But if you have one witness to one overt act and another witness to another overt act - it is enough -

It is said that a Rebel may be a witness in treason but the Judge thinks there is not

Criminal law. Offences agt Religion

law. The Judge says. there is no case to support this proposition of elementary writers.

Offences against Religion.

Of these there are two Apostacy and Heresy. as they do not apply here. & shall not mention.

The governing principle in these cases. why they are punished at all. is on account of the disturbance they create in society. There is and ought to be the perfect freedom as to religious opinions.

Blasphemy is a technical term. and does not mean exactly what is meant by that term in common parlance. As denying the being and providence of God. contumelious reproach of Christ. and reviling at the Scriptures is blasphemy of the Books. these you observe do not restrain the liberty of opinion. But for reviling and contumely is altogether unnecessary and tends to disturb a Christian Country. and this is the governing principle. This definition does go to expose the man who denies the being of God. but this is the only heart which can be considered as tinctured as illiberality. Religious opinions should never be invaded. but the manner of expressing them should be regulated.

Criminal law. Offences agt Religion

Religious Imposture is punished and there is false denunciations of judgment prophecies &c there is liable to perpetual imprisonment

Profanation of the Sabbath comes under this head. This has been considered in christian countries as demanding the oversight of the Govt. It is surely not to be doubted that every Country has a right to set apart one day for worship. The Sabbath is a Com law provision. The manner in which it is to be kept is to be regulated by Stat.

Profane swearing. What has been so considered at the Com. law the Judge has not found out. Under the Const that the oath must be by something. The grievance must be examined into. April 29th

Homicide.

There is no perfect definite one in use. The Judge will consider these examples in the books and examine the governing principles.

Homicide is sometimes Murder at others Manslaughter and sometimes excusable and at others justifiable homicide.

To constitute murder there must be malice. That sense of it which is so called in the books. Better expressed by the latin word malitia There may be no particular ill will and yet be malice

and thus murder - It is no matter how the malice may be manifested - it may be evinced in many ways -

Principles of law in cases of murder break in upon the governing principle sometimes as in other cases they should be noticed by law -

Where there is not the malus animus it is not murder -

Manslaughter is of two kinds one is voluntary it is where upon a sudden and violent provocation one kills another. Where the persons have had time to cool - it is not manslaughter for be then shows a wicked heart - and it is murder - But if the provocation is considered by the jurors as a slight one - it is not manslaughter such circumstances always open a door for discussion - Thus voluntary manslaughter is when a man does an act when he intended to do that act -

Involuntary manslaughter is in consequence of doing some unlawful act or of doing a lawful act in a careless manner - As if a man throws a piece of timber from a house not in town - and kills one - it is manslaughter of the second grade -

Criminal law. Homicide

It may be sometimes excusable - and it is when it is done in self preservation or se defendendo. In a quarrel if one kills another se defendendo it may be murder manslaughter or excusable homicide. If he has done all that a man ought to do in such cases it is homicide se defendendo.

There are cases in which you may defend yourself - must not budge if an enemy - as where one attempts to break into your house or commit a rape - you may slay him.

Another case is homicide by misadventure - or chance medley - as where one is cutting wood and the axe flies from the hand and kills a bystander. This is excusable. But where the axe had flown off before it would be negligence - and also the case.

Justifiable homicide is where an officer kills or kills another in endeavouring to secure him as his prisoner. But there must be apparent necessity for this.

Where a child escapes under key - in a key room and it comes in with his hat for his hat key to his cattle - and runs the child thro-

the body and kills A. it is homicide by mes adventure.

Where the accused flies off as in the case before mentioned and where that has not been accustomed to fly off - it is the same thing being no malice aforethought.

But where it has been accustomed to fly off - it is involuntary manslaughter.

When a man intends to shoot a sheep and kills another man - it is not the Judge thinks murder. for the malice is wanting but involuntary manslaughter for it is in consequence of an unlawful act.

The case of wrestling if a man is thrown and killed - if it is conducted fairly - it is excusable homicide - but if unfairly it would be involuntary manslaughter.

If a man in throwing a club at a dog and kills another as this is unlawful it would be considered involuntary manslaughter.

If a man attacks another with a Club to chastise his insolence and kills him - the law says it is a manifestation of an unsocial heart - and that he must be cut off.

If a man in a passion throws a large stone into a company and kills one. it is the unsocial heart

Criminal Law- Homicide

Where one intending to hit Thomas has his shaft drawn from under him by another and is killed it is manslaughter -

Where A intends to hit and kills B- but hits and kills C- it is murder- for here is the malitia -

But where B provokes A in such a manner that if he had been killed it would have been manslaughter- if he kills C as above- it is not murder- But there has been a question on which there has been a difference of opinion -

Where a schoolmaster whips a boy lawfully and in a proper manner- but kills him- it is excusable homicide -

But if he has taken a club- and killed him without intention- it is involuntary manslaughter because the weapon is unlawful - But if he had beat him with a shovel- it would be murder- for here would be malus animus -

If a man thrower breaks from a house after giving warning- and kills a watchman it is excusable homicide. Because when it is done in a city- where he knows people are continually walking, here is the malitia- and it is murder

If any man turns out a mad bull and he kills one it is murder -

Criminal Laws — Homicide

If one throws a squib which would probably kill into a Crowd - it is murder -

There is a case stated by Foster - A man and his Wife were invited to dine with a friend he carried his gun with him but took out the loading. While he was eating somebody loaded the gun in his absence - On his return he accident by killed his wife who was a very beloved one - It was excusable homicide - so determined by Judge Foster -

It is laid down by Lord Coke that if a Sheriff should execute a man in pursuance of a sentence passed by a Court having no jurisdiction - it is murder - The Judge says Coke is in doubts whether it would be so considered now -

So it has been said that if a man has been sentenced to be hanged and the Sheriff cuts off his head or shoots him it has been said to be murder - but more modern opinions are opposed to them - vv

April 30th

There is another case in Foster which stands on the same ground as the above mentioned - A man took up a pistol and examining it with a Ram rod - concluded it was not loaded - the Ram rod was to shoot - he carelessly pointed it at a man and killed him - Foster states it as excusable homicide Foster is one of the best Law writers

Criminal law. Homicide.

The principle here is not so clear as the former case. The Judge coincides in opinion with Dos. for in a thesis ordinary care was used ——

With respect to an officer who in taking a man or killing him. when he attempts to escape. there is a distinction on this subject which the Judge does not like. If a man is condemned & [illegible] as killed in attempting to escape. it is excusable homicide. but for a trespass merely. it is manslaughter. The Judge does not think that [illegible] would be excusable for killing a man who had got out of his reach.

If an officer kills a man who is attempting to escape. and kills him. it is excusable homicide.

Se defendendo.

This rests upon the principle of self preservation. and there you must keep in view. Of this there are two kinds. The person assaulted may kill sometimes will not retreating and sometimes he must retreat.

He need not retreat. when a Robber attacks him. or when one attempts a rape. or burn house there need be no retreat.

But there are cases where there must be a

Criminal law. Homicide

a retreat. When men are engaged in a brawl and one retreats it is not murder.

If the slayer in that case kills his opponent it is manslaughter - but if the slayer did not wish to fight and declined it is excusable homicide.

Where one of parties another with an intention of rousing his passions so as to get him to attack him and then he retreats and kills. It is murder. The malus animus is here.

Manslaughter & the first instance is always presumed to be murder - and it turns upon the accused to show that it was not. No matter how great the provocation is if the man has had time to cool it is murder. It is not passion that excuses man - there must be a provocation, to excite his passions. just as it is slander.

No words gestures or any other actions of presence of contempt will be sufficient to excuse it to manslaughter if he meant to kill. This is a nice distention - If he makes use of an improper weapon in such case it is murder

A boy was caught stealing wood on a park the parker tied the boy to his horses tail and rode off and killed him - It was held a murder —

Criminal law- Homicide

Two young boys fought and the youngest being somewhat hurt went and complained to his father- who went 3/4 mile after the other Boy and killed him- it was held manslaughter On one Report it was held that he had a Right- if so it would be manslaughter- but else the Ridge Murder-

If one attacks a person there is a provocation If one should persist offering improper violence to his wife or family- there is provocation- So if he should persue a man in bed with his wife- and should kill him- it is manslaughter-

The killing of a man in duel even without a spirit of ill will or the malus animus- the policy of the law considers as Murder-

The same is the case if resistance to an officer when the prisoner has no intention to kill but merely to get off- it is murder on the principle of policy to deter men from resisting the authority of government- There are excepted cases and it is no benefit upon the principle-

The punishment of Murder- is death without benefit of Clergy- Manslaughter- is punished by C. Law- with pecuniary imprisonment and branding in the hand-

On the Trial if the prisoner is indicted for

murder the Jury may find him guilty of manslaughter.

Under the Court that a question has arisen. If a man is indicted for murder and the Jury finds him guilty of manslaughter - what is it if voluntary - or not - There is a difference in the punishment. The Judge thinks that the Jury ought to inflict the punishment of involuntary. That being the lowest and then the Jury knew that they do not inflict too much. This is applicable to many cases where the punishment has been altered. The decision has been the other way.

If private persons act as officers the law does not consider them as officers unless they act under command of the officers.

May 1st 1815.

There is a criminal redress called a complaint or Information to bind persons to keep the peace. Courts have this power of binding persons resident to their jurisdiction. Where they have the power of fining. In cases of violence they can bind him to keep the peace. There are other cases where Magistrates & officers may bind persons to keep the peace - as if a Justice of the peace should perceive two men fighting he may issue a warrant to have them brought before him and bind them to keep the peace - so if they are not actually fighting but are attempting - This must be in their view - as it is called - if it is not then in their view the process is by Information.

Criminal law. Information

This is not very often done - for the process is usually upon the Crime itself -

But the process is much in use - where one fears violence from another - he goes before a magistrate and enters a Complaint upon oath - and the Magistrate issues a Warrant to bring the party before - and if he thinks there is ground of fear he bends the party to keep the peace - But there must be such ground of fear - as would operate upon a man of ordinary firmness -

This may take place where a man abuses his Wife - or a Wife her husband - But the more usual process is to bind them to good behaviour - and not to keep the peace -

The binding to keep the peace is Com. Law - The binding to good behaviour takes its rise in a Stat of Ed 3d - It extends to all offences punishable at law - This is the meaning and construction of the Stat - A binding to good behaviour is more extensive than a binding to keep the peace - because in the former case any breach of law will subject a man - but in the latter only an act of violence - This Stat comprehends all night walkers eavesdroppers - persons who accost bawdy houses - and such as sleep by day and make by night &c. such as turn over Carts at night &c &c -

Under this Stat it has been determined - that a person who acts lasciviously may be proceeded over to good behaviour -

Criminal Law. Information

So a vagabonds may be bound over under that Act and he is deemed to be one who nobody knoweth whence he cometh nor whither he goeth.

The consequence of their binding over whether for good behaviour or to keep the peace is to find sureties. This is not considered as a conviction of an offence but only in the nature of bail. If he does not find sureties he must stand committed he finds them. But that should operate as a perpetual imprisonment. The next Court of Session upon application made to them discharge or continue the Bond as they think most conducive to the security of the Individuals who complained.

This Bond is always discharged on the death of the person and does not like other Bonds affect the heirs.

This recognizance is always forfeited if the man is guilty of any breach of law that is criminal if he is bound to his good behaviour. If he goes into his neighbours Yard and cuts down his trees there is no breach of the bond even if it should have been made since the binding.

Mere reproachful words is no forfeiture of the Bond for they is punished at Law. But a question may arise under the Contract that punishes Slander.

A challenge to fight is a breach of

Criminal Law. Information

Attachment.

the bonds, the words are not do at sea. challenge if a man puts a Chip upon his shoulder and bids another to knock it off -

On the subject of Murder see Foster particularly. Black: Com. and Hawkins -

There is another process to wit attachment which is incident to every Court - and is a commitment of a man to gaol for disorderly conduct in the presence of the Court or for a refusal to comply with some order of that Court -

In the first case the commitment last only during the sitting of the Court - for the only object is to observe the peace of the Court -

But in the other case to wit a refusal to comply with an order of a Court - the imprisonment may be forever - tho the order is complied with. But when the thing cannot be done as - when it has passed - the attachment is in nature of judgt to continue for a limited time. In this - there is no bail -

Sheriffs Gaolers and Attornies are liable to this attachment when other folks are not - and the reason of it is that they are officers of the Court and misconduct on their part brings the Court into disrepute - As when a Gaoler extorts from the

prisoner - or an Atty who is guilty of dishonest practices - These are indeed liable in exchange but their punishment may likewise be inflicted - Party men too are liable to commitment on attachment - All these are committed for a limited time - So Witness who refuses to swear - or having sworn refuses to testify may be committed to gaol on attachment for a limited time -

This extends to all cases where there is a Rule of Court - as where A. owes a sum of M. to abide by an award - This must last - till the rule is complied with -

Rule nisi made the proceeding on these attachments - This is very summary - It is done in case of disorderly conduct by mere word of mouth by the Judge - But in some States it is so no person can be committed without a Mittimus - then that is necessary -

In the other cases - the Ct make a rule to show cause - upon Complaint - If he does not shew cause then they take the Complaint to be true and the attachment issues of Course - But if he shews cause - and it is sufficient - there is a dismission of the Complaint - This last is sometimes by a Jury - and if the jury acquit - the attachment issues of course - In these cases - a man is bound to answer all interrogatories but to be on oath - And the C. L. says that if a

Criminal Law. Bail –

man cleared himself ~~that~~ by swearing falsely. the
Court went no further. but discharged the process. Rex
was the case in Mandamus &c – But the Statute
has made alterations on this subject. Wingfield's
the return to be traversed. – But at Com Law the
process stood or fell by the oath of the party. – –

17 Bacon's Abr 142
1 Salk 84
1 Strange 485
Bac. Abr.
Bac. Abr. 546
6 Mod: 73

Bail. –

When bail is given a Man may go
at large. but his bail may deliver him over last any time
he pleases. If the principal does not appear on the
Bail forfeits his Bond. When the bail deliver
him over. he is committed to gaol till he gets bail
again –

It has been contended that if B goes bail
A. in this State and he runs away to N. York that
B. cannot take him. the bail piece is mere evidence
of his authority. and is not a Warrant. The fact is
the law has created him. and this exists as well
in one State as another. The man belongs to his Bail
and much as the Bail's house does. This has been
much wandered about in the different States –

2 Va. Cases 99

At Com Law all offences but homicide
were bailable. even treason was bailable before com-
mitment to gaol. This is altogether regulated by Stat

Anderson 97
1 Lev: 209

Criminal law Bail -

After conviction there is no offence bailable - for that must ever somewhere -

But the Supreme Court of a State may make even homicide bailable. at their discretion. - This is done by habeas corpus -

Bule: P. C: 98.
Latch: 12.
& Mod: 328

By English Statute Treason & Arson are not bailable - And all offences which the man confesses he has committed are not bailable. The Judge says after verdict of Guilty there can be no bail at C. Law. Breakers of prison are not bailable - Thieves openly known and notorious as the Statutes specify are not bailable. These are English Statutes.

Rul. P. C/101

1 Salk 103

Here observed that after conviction of an offence the man is not bailable. but to this there is one exception. where a man is convicted and lies dangerously ill in Goal - and physicians think he ought to be removed he is bailable - there is a case on this: where a man stabbed himself after conviction the Court refused to bail him on the ground that it was brot upon himself -

1 Bulst: 95
& Mod 165

This bailing in case of homicide - is not very common - the Courts will not do it frequently -

Actions on Contracts. Assumpsit

By Judge Reeve.

Assumpsit is a promise to do or not to do some act. It is the same thing whether in writing or not. If it is under seal it is a covenant and ceases to be an assumpsit. I shall not enter into the nature of the Contract this enquiry has already been gone into under a former title. Contr. An asst is founded on some Contract is founded on a Contract expressed by the Parties or implied by law. There are then two kinds of Asst. express or implied. Express asst may be parol or by writing. and implied Asst may arise from the circumstances of the Case. In a Contract the judgt. must be for the sum agreed upon by the parties. An implied Contract is founded in the justice of the Case. The law commands the thing to be done and itself raises the promise. As where A. pays B. money by mistake. There is no promise but the law makes the promise to pay it again. It is said the law presumes a promise. but this is not so. as will be seen by and by.

Thus action may be brought asst in all cases where one man has in his hands property or money of another which in foro conscientiæ he ought to refund. unless some principle of policy forbids it. Debt asst will lie in almost all cases where the action will lie on an express promise. Thus where a note is given. an debt asst may be brought on the note. and the note given in evidence or on the express promise. So debt will also lie. but debt is now out of use.

The object in both cases is the same. to recover the money. But they are also concurrent where the object is not precisely the same. As if where one man buys stock of another and the stock is not transferred. Here the action will lie for damages on the express Contract. or he may waive the Contract and bring an Indebitatus to recover the money paid. When an Indebitatus is brought it is upon the footing that there is no Contract and to recover back the money paid. It is no matter whether the Contract is in writing or by parol. Even tho the Contract is in writing it may be annulled if it has not been acted upon by the other party. A written Contract is of a higher nature as to evidence than a parol one. tho there is no difference as to the bearing upon them. A written Contract cannot be proved by parol in any case but where the original written Contract has been lost by accident then it may be proved by parol. the presumption is that the parties are to avail themselves of the best proof in their possession.

Another case where then action will be. where the promise is to do a collateral act as to build a house. here if he does not build after he has been paid. an Indebitatus will lie. but where the money has not been paid and he does not build. an action will lie on the express promise. and damages be recovered by reason of the fire.

Suppose the parties make a Contract and ascertain the damages between themselves. in this case indebitatus will lie for the amount of the damages. The elementary writers say that indebitatus will lie in all cases where debet will lie but this is not so. for it will lie in many cases where debet will not lie. Id certum est quod reddi certum potest. the market price in cases of goods bought will make it certain and a debet will lie. Suppose in case of Services rendered. indebitatus upon a quantum meruit will lie. and so will debet. because it can be rendered certain by referring to the common price of labour. In many cases it is concurrent with nothing under heaven. for debet will not lie where there is no privity of Contract. Thus where property is obtained by fraud or violence. as when Tom Stokes chouses Colin Stiles. he gives him money rather than be chouses. indebitatus will lie for the money. But to this general rule there are exceptions as where a punishable offence is in. Thus in the case of gambling. where one man wins money of another. the Com. law says no. because the loser is not a fit subject for the mercy of the law. The law leaves them in statu quo on a principle of policy.

Suppose Stokes is more than half drunk and Stiles knows he will cheat him of his horse by buying him not one fourth the value. here

the money can be recovered for no principle of policy interferes. The parties in cases where the law will not assist them must be in pari delicto. Where in consideration of not being sued a man renews his note and gives usurious interest more than lawful interest cannot be recovered. They are not here in pari delicto. Where a man is entitled to be a Bankrupt and applies to a Creditor to sign, he refuses unless the poor man gives him a sum of money. indeb. asst. will lie for the recovery.

It is frequently said that there must be a presumed assent. But this is not true in all cases. Thus where a man obtains money by fraud, can it be presumed that he assented to pay. The truth is that the law obliges him to do it. So if a husband turns out his wife and for bids any body to furnish her with necessaries, the assent cannot be rationally presumed but as in the former case. It is his duty to pay for them.

There is one case where this action is concurrent with Trespass or Trover. As where one takes the horse of another and sells him. here is liable for the tort or that may be waived and this action may be had for money had and received. since the evidence which will support the one will support the other. Again a Contract has been obtained by that species of fraud which destroys the Contract and money has been obtained. here this action may be maintained. as well as an action on the case for fraud.

Contracts. Assumpsit

It is held down that wherever there is a contract entered into of a higher nature, the lower one cannot be sued upon. It is merged. But it is necessary to explain this rule, for it is not true in all cases. Suppose a Bond is not given for a debt but to enforce some collateral act. here the original ground of action is not lost. Suppose Stiles and Stokes get into a quarrel about something, and they leave the matter to arbitration with a Bond to abide by the award. Here Stokes may bring his action on the original ground of action, or on the award on the Bond to abide by the award. It is also laid down that if a man has a Bond and afterwards the obligee promises the obligor to pay. An action can not be maintained on this promise. The reason is that there is already sufficient ground of action. But there are some cases where this action will lie upon the promise as where there is some new consideration arising.

There are some promises by parol which are void under Stat of ℔ and Perjuries. This Stat is adopted in all the States of the Union. A promise to pay the debt of another is bad unless in writing. Stokes owes Stiles $0 Dollars on Book and Wheeler promises to pay by parol he is not bound. But there are some cases where a parol promise under some cases where the promise is good. As where one man says that if a Creditor will serve up the

note, he has as his creditor he will be. In short as long as there is any chance of getting the money from the Original debtor, he can not. A collateral promise will not bind unless in writing. There seems to be an opinion entertained by some that where there is a new Consideration at latter end of the Statute. But this is not so. Suppose A says to B. Carry goods let him have them. I will pay you. he is not bound. ~~but~~ Vide 2 Burr. 1012. Money had on insufficient consideration supposed to be lost and the after events answer the money may be recovered by an Indebitatus Assumpsit even a judgt of the Court will not alter it. The usual way indeed is that in such cases a new trial must be had. But a judgt of Court never stands in the way of the recovery of money provided the judgt is not impeached by the action. as is the case here. The judgt as the case appeared to the Court was proper. but subsequent circumstances gave a different aspect to the affair.

2 Burr. 1010
1 T.R. 281
Doe, 112

If the Consideration happens to fail, the money can be recovered in this action. There is a law in England that where an annuity is given, the whole must be paid in cash. There was a case where one man had given another part money & part goods. for an annuity. Here the Consideration failed, and the money was recovered back. A man promised to give another a lease, but could not give it them. the lessee paid the money. before he entered it was found that the lessor had no

1 T.R. 732

2 T.R. 366.

Parsons 364

latter the consideration money was recovered back. So too where a man promises to do some act which he is paid for, and then a stat. makes the act unlawful. the money may be recovered in this action. So if it becomes impossible to perform. it is the same thing. So the sale of an article. if the thing proves of no value. the consideration fails. and the money may be recovered. It is not safe to bring fraud in this case. unless fraud can be shown. Suppose a man sells an article which he supposes his own and it is not. here the money may be recovered. So too in this case an action on the implied Warranty created by law. This action is the proper one to recover money from a person acting under a power and unduly. A owes B money. C forges a power of Atty, to receive it from A. he sues A. and recovers it. and then runs away. B. may recover from him again. The reason in this case is jus primi est in tempore potior est jure. Admr is granted to A. he collects debts. from B. C. D. E. afterwards a will appears. of course the Admr is void. Now must the above BCDE pay the Executor again. This and it depends upon matter of policy. The Admr was in this case appointed by Government. and it is a matter of policy that they should not be subject to again. But where the authority is created by the parties. the rule is different. There is one case which says that the debtors would be liable to Executor. 1 Bulk 27 3 T.R. 125.

1 Bl Rep 742. Where the Court has no authority over the subject matter. the judgt is entirely void. - ats if a Justice should give judgt on action of Trover for 50 dollars. D - - - - - - - - - - -

The principle in the cases of recovery of money in cases of extortion is as broad as the principles in Court of equity. + A Court of Equity will in certain cases entirely break up the Contract. but a Court of law will not except in case of actual duress. 2 Stra 915 In this case it is different. + In the case in Strange a Man had loaned some plate for a debt. and then offered to pay the money and take up the plate. but the plate would not be given up. unless he would give 12 pr Cent for the money. he then sued & recovered on the ground of extortion - and not of usury. It was objected that what was done was voluntary. That is a metaphysical kind of reasoning which never can satisfy. for the choice was made by preferring a smaller evil to a greater. It has been alledged that in cases of Usury. money cannot be recovered back 2 T.R. 763. because of pari delicto criminis. per Lord Mansfield. - An obligation obtained extortion can not be recovered upon. I have observed that money obtained by embezzling. cheating - may be recovered - There is an old feudal reason as this which is that where a man steals there can be no recovery. it is lost in the crime. The reason is. that all a mans property was forfeited.

when he stole. The English Law got over this. B. N. P. 130
A person was nurse of a sick man and ran
away with his property. It was recovered. A. Salk 285
woman married a man who had another wife
she not knowing it. But afterwards discovered
it. She sued for the rents of her land and recovered.
Thus property thus obtained may be followed
provided the third person was privey. Any
thing that passes as a currency cannot be recovered
when it has once been passed. On principle of Comb 197
policy. But often species of property may be
thus recovered.

Money recovered on an erroneous judgt. when
reversed may be recovered. You cannot show
that the judgt was erroneous by any thing
that is collateral. It must first be removed
by reversal. for it is a judgt like it is removed
out of the way. If it had been a void judgt
then the case would have been different. A
man can never sue another on Contract. when B. N. P. 121
the judgt is erroneous. but does when the Comb 419.
judgt is void. There is an opinion of Ld Mans-
field which is said not to be law. that where
the jurisdiction of the Court was limited over
but a part. the money could be recovered
back notwithstanding the judgt. Moses vs Mc 2 Burr 1008
Farlane. The Judge believes the principle well 2 Blk 219.
founded.

If a man has paid money upon an illegal
contract and there is no penalty inflicted upon

2 Bla 1074
1 H. Bla 65
Cowp 790

the payer but only on the payee it can be recovered back. But cases where there is a penalty inflicted upon the payer - for in the latter case they would be in pari delicto -

2 Lev 252
1 Bl R 619

This action is used to recover tolls and penalties inflicted by by-laws of Corporations. -

Where observed that where one man does another ought to do. i.e. one performs the duty of another is to be understood with restrictions. Where there is a duty put upon a man to furnish necessaries or to do a certain thing and not immediately connected with necessaries and refuses to perform another may do it and recover for it. As where a man turns away his wife or child and they are provided for by another. There may be a Recovery had. So too a recovery may be had for the expenses of a funeral. Somebody must bury the dead - But the funerals in these cases must not be carried too far. for the parents may be poor and then are to be furnished by the Town -

Express Contracts founded on Sales -

In every sale there is an implied warranty of title. it follows therefore that where the title is bad he may recover he may sue on the Contract - and recover damages - or waive the Contract and bring an action for money had & received

5 Burr 2639
2 Bla 1078

Sales at Auction -

The law on this is in some respects peculiar. The printed terms which

Contracts — Assumpsit

may be set up. are the ones which are to govern. notwithstanding any verbal declarations of the Auct. to the Contrary. Suppose a man is the last bidder but before the article is knocked down to him presents, he is not bound. Verbal contracts by Stat in Engld for more than 10 £ is not good. But sales at Auction are not within the Statute. It has been decided so by the Court.... Suppose the man knocks A. and Dont take the goods off. he may be sued. But the Auctioneer may set them and sell them a second time and sue if they sell for less. for the deficiency. If earnest money is paid. a request must first be made before the second sale. A man makes a deposit and bids off goods but does not take them off. the deposit is lost.

1 H. Bl. 289

3 T.R. 149

4 Burr 2101
1 Stra. 306
3 Burr 1921

1 Salk 113
1 Saund 67

15 T.R. 745

A man advertises to sell to the highest bidder the Auctioneer receives orders not to sell them for less than a certain price and receives 5 dollars by way of bribe. If he does not abide by his orders. he does right. Can an Auctioneer bring an action for the goods. yes. he has a special property in the goods. Is the Auctioneer personally liable to the purchaser or the owner only. If he gives up the name of his principal. he is not liable. if he does not he is. Lord Keeper Henley thinks he ought to be liable at all events.

Com. Dig. 395

1 H. Bl. 91

Esp. N.P. 17

Actions on

17. K. 133

When ever the terms of the contract are such that he may return the article, he may recover in this action. But this article must be returned in a reasonable time. Thus where a man bought a pair of horses under the idea that they were 4 years old, but he found that they were 8 years old. he returned but not in a reasonable time. the horses. the Court held this action would not lie. but on the Warranty he was liable. Vide the Case of Western and Bond for an application of this principle in Douglas. The judge says there was no agreement as to the age from some observations of the Judge as to clinching bargains which were not distinctly heard).

Est. Leg 13th
1 H. Bla 17

1 Sha L. 107

Where a purchase has been made and the money tendered. this action will lie. It is not always necessary that the Vendee should be called that the article should be delivered. for a Consent that it may be taken. is sufficient. But where the Money is paid the article is vested in the purchaser and this Consent is not necessary. Sometimes it is the duty for the seller to bring the goods to purchaser. if he does not it is a breach of the Contract. If a man buys goods and he orders the manner of delivery. and they are lost the Vendee must bear the loss. But never where the seller undertakes to deliver.

Comp 294

Wager

Wagers are lawful of some kind. All Wagers on frivolous are good for nothing. There are many on this sort yet in England. There has been a question whether an action on

~~Lawful wagers~~ cannot be sustained on the ground 38 N.C. 93
that they were vs sound policy. Justice Buller has Comp 38
said that all wagers were void. But the Courts have
acted differently. If a wager is of such a nature
as even remotely to be injurious. It is against sound
policy and void of course. So a wager tending to Comp 739
wound the feelings of another or to introduce
indecent evidence into Court are void. But in-
decent evidence frequently must be introduced
where a right is concerned. But in wagers there
is no such right. Where two young men laid a wager 5 Barn & Ald 603
that their father would live longer than the
other. It was held good. In all wagers there must Comp 36.
be a contingency or the wager is void. Ld Mansfield
says in the case alluded to in the margin that
the case was uncertain. Wagers on that subject
then are good. - In 3 Barn 1836 there is an impor-
tant principle which rides on the subject of Stat.
of frauds and perjuries. The circumstances of
this case took it out of the Stat. for the man had B.C.P. 292.
a lien upon the goods. It has been decided that
a new consideration taken it out of the Stat. 2 Wils 84
but the case in Buller says the contrary. Vide 1 Wils 305
which are said to be contradictory. Assd B for a
Bentley. C says such an one the debt and Powell 28 N 280
pay you &c. The promise was good. because by
entering a retraxit he lost all claim says the Judge
upon B. and C became liable.

This action likewise is brought to recover rent where there is nothing but a penal demise. The grounds of the recovery is the occupation of the the premises. and not the Contract. It seems to have been a disputable point once whether this action would lie. The Judge thinks it would. In this case this action will be by Stat of Geo 2nd. The Court generally give what the parties agree between themselves. It is said in Hutton 24 that left would not lie but debt. but this is not so says the Judge. -

1 Ld R 378

We are told a mere courtesy will not support an action. One man renders an other services for which he expects to receive a compensation. he cannot recover. Where a man takes another horse out of the mere. he cant recover for his courtesy

Holt 106

Where a man has lived with another and rendered services for him under the expectation of receiving a legacy - and none is left him. he cannot recover for his services. A mere request would alter the case. Custom changes the case. Thus where porters or penny posts do business in their line they may recover.

Str 988

Holt 105

Esp big 288

When a service has been performed the rule of law is, that where the service has been of use. it is not tendered a promise. But this is not the rule now. Where a man is not obliged to pay. Where a there is a moral obligation, and he promises he is obliged to pay. This is true in a restricted sense however. So in case of an illegitimate child where the father promised to pay. But this rule does not hold where the original contract was void. As

Cro C. 184
Cro E. 292

where a married woman gets goods and promises to pay for them and renews the promise after her Husbands death. the promise is not binding because the consideration of the promise was void — B. N.P. 14.2

There rule in the Books that where a man in consideration of another doing an illegal act gives him money he can recover it back before the thing is done but not after is bad. says the Judge and in two New Reports there is a decision. that the money cannot be recovered back at any time before or after the thing is done. It tends says the Judge to a breach of the law.

The object of this action is to recover damages — but remote damages are not to be taken into consideration. The rule of damages is the sum contracted about and the interest. But direct and consequent damages are ever taken into consideration —

In this action all equitable circumstances may be made use of by the defendant to lessen the damages. There is one set of cases in which indebitatus assumpsit will not lie which is that where a man impounds a number of cattle. the owner came to take them out but J.S. would not let them go — till damages were paid. Jam Stokes says that his cattle were not trespassing but for the sake of getting back his cattle he paid his money. protesting against it. The money cannot be recovered in this action — because, a right of common right as in this case cannot be tried in an action of indebitatus assumpsit. Com. Dig. 4 H 4

It has been a question whether Lord

other person than him to whom the promise was made can bring this action. This question can only arise where the promise to made one for the benefit of another. that is. whether the Cestuy que trust can bring the action. The trustee is ordinarily to bring the suit. Where are cases says the Judge where the Cestuy que trust may bring the action. As where a man on his death bed. leaves his land to his son with the privilege to his daughter to cut off timber to the value of 800£, the son not likeing this promised to pay the 800£ if the father would alter the will. After the old mans death, the son refused to pay. Now how could the suit be brought. the son being both promisor and Executor it must be brought by the daughter. The case where a Bond is given by A to B. for the benefit of C. there is no case on the books where C brought the action. though it is no where said that he cannot. It said indirectly in Leyers Reports that he cannot. The point has been decided in the State of Vermont by the National Court. under Judge Ellsworth. Another rule on which the elementary writers differ. is that a promise restricted to no particular person is good. and some say bad. As where a man promises to whoever will marry his daughter Phebe. he will pay 20 Dollars. Tom robes marries her and brings the action. he could not recover. This is contrary to practice. where for stolen goods a reward is offered

Leo 2 164
1 Vent 6.
318.

1 Roll 6

to whoever will deliver them, an action can be sustained on such promise --

Where money is paid into the hands of an agent who has no business with it. the action must be brought vs the agent or the principal according as the agent has paid it over to his principal or not - This is the rule. There is one case where the agent had not paid it over but passed it to the credit of his principal, it was held not a passing over 1 Burr 1985 Cowp 566

With respects to agents their contracts made under authority do not bind them selves, but their principals. But where they do not act under authority, the rule is otherwise - In an action on an express asst you must prove it as it is laid - if it does not tally with the declaration the Plaintiff will be non suited. Cro Car 241 1 Salk 442 1 Bla R 670 1 H. 182

The declaration in indeb asst states that he did receive money to the Plff's use, and that he is liable &c - The practice of the English courts is for the Plff to state before hand what the action is brought for. as for money paid by mistake - or any other how - So where the action is brought on a Quantum valebant or a Quantum meruit - the declaration is general -

On an express asst - the promise must be precisely stated as it is - and a consideration must be stated - the Contract must thereof &c - what it was - and that it has not been performed

and the Deed concludes with damages. If no consideration is stated it is bad upon demurrer. so where the consideration is unlawful. &c. also on Bonds.

When is a demand to be made. The rules on this subject are blended says the Judge. If the contract is of such a nature as that the man can perform it without being called upon he need not be called. if he can discharge himself by tender. This is the Judges rule. But where the Contract is such that it can not be performed till demand then demand must be made. on Bills given on stores are of this sort there must be a demand made. Thus in all cases where a Corporation is debtor. a demand must first be made upon the Treasurer. Thus an Executor must demanded. There is a difference between notice and demand for there are cases where the former must be given and not the latter. Every notice does not include a demand. As when a man agrees to go to Hartford for another and transact business for him. he goes there and does the business. but no right of action accrues till after notice given of his going to H. D. So where an order is given to one on another and the latter will not accept it. there must be notice of non-acceptance. Where A agrees to pay B on his marriage. it was held that personal notice was not necessary. for

Defences to Actions on Contracts.

Tender.

the law in that case presumes notice.----

Of the Defences &c.

To every action there is a general issue, that to assumpsit is non assumpsit. The general idea of this is that he did not promise, but the fact is that any thing that goes to shew that the Deft ought not to recover may be given in evidence under the issue of non est It resembles an issue of nul debet in an action of Debt. They have tried to make a difference between promises express and implied as to this issue, but there is none now. The Deft however is not obliged to plead this general issue. That is if he has infancy to plead, he may plead it specially and spread it on the record or give it in evidence under the general issue as he pleases. There are also some general defences which relate to all actions. 1st Tender. This may be plead to an action of Debt or Covenant or any thing. It is where one offers to perform his part of the Contract. The effect of a tender is that it does the Tenderer as much good as if the Contract had been really performed. and pleases him in the same situation. As again if one be ready to tender and the tenderee is not at home it is not necessary that he should tender to the walls. but it pleases him just as if he had actually tendered Further a tender is a good defence only where the damages are certain and where it does require the

intervention of a jury to ascertain them: but where they are uncertain as in case of slander a tender is of no use. In England there is an exception to this last in some cases, as before Justices of Peace, and in some of the States in cases of involuntary trespass by Statute. And where the parties differ as to something posterior to the Contract. as for payment of part. though it seem uncertain yet a tender is allowed. But tender is never a defence in Toto. If the Tender be of money, the Tenderee must take it home, but if be cumbersome such as hogsheads of sugar he may leave them where they were when tendered them. A tender and refusal discharges all securities for that sum. In England and some of the States where a man is sued who has not tendered, he may bring money into Court and tender it there - the effect of which is: if the Plff takes it he gains his costs. but if he refuses it insisting that more is due and it be determined that the Plff was wrong he loses his costs -

17 N. 465

It has been much disputed whether after tender and refusal the man who tendered is liable if the money be lost in the Interim as by the Burning of a house - Some writers say that the debt remains. & doesn't part as the Tenderee becomes a Bailee of the money. & certainly if one be bound to deliver sugar and then tender and the other refuse. he is forever discharged of the debt: why then should the tenderee of money be in a different situation. Plumer says Judge N. he is not

but it is said that the note is extinguished because the tenderee is liable for the note and Costs: but the fact is, that the tenderee is only liable because he cannot plead his defence, for it is necessary to say in his defence that he has always been and is ready to pay &c. and of course if he cannot say that he is ready to pay it is impossible to plead tender. and besides this is the law of all Countries that tender discharges the debt. If one go out of the Country, he cannot receive interest for the time of his absence if he has left no agent. In Davis Reports and 5 Bac 5th there are some cases which were to this effect. In Elizabeths time certain money was made current as shillings by proclamation during the time when this proclamation was in force a debtor tendered them to a Creditor which the latter refused. After the proclamation ceased the debtor was sued on the original contract and not recovered against. Now this shews that the money belonged to the tenderee for he was the sufferer by the depreciation. In this Country in the time of the Continental money, some of it, which was a legal tender was so tendered during the absence of the Creditor abroad. The Question was who should lose it. Some said that the British Treaty secured their debts but this was nothing for the question still

Dav. Rep 18.27
1 Dyer. 81

recovered, what was the debt, whether the amount originally due or only the amount tendered — But the true opinion was that after tender it became the money of the Tenderee, and he must bear the loss. But if the Tenderer of cumbrous articles takes them home with him, and then refuses to deliver them upon demand, he is liable to the Tenderee in Trover.

3 T.R. 684
5 Bac 4
5 Co Rep. 115
Sho 916.

A tender or by an Error is good. We will now consider what is a good tender. A man must pull out his money bag and say there. It is not enough that he say that he has come to pay. Where the Contract is to do one of two things

Doug: 14

at the option of the obligee, the man must tender both. But if be as things generally are in the alternative, a tender of either is sufficient.

5 Co Rep. 114

The legislature always may say what is a good tender. Tender of money in a Bag is a good tender so also Copper Coin. But not to any great extent. The question was tried 40 or 50 years ago in N York whether a great sum could be tendered in Coppers and decided not.

A tender of counterfeit money and acceptance discharges that obligation. But the Tenderee can state and recover. Thus if A come along with a Turkey and B buy it and give counterfeit money. A can recover for the Turkey. — — —

If Bank notes are tendered, and the party makes no objection on the score of its being money it is a good tender. There can be no objection to them

B.R.

5 Co Rep 552
1 Burr 452
5 Bac A.

after overdues on that score. ... If there is nothing on the Contract respecting the place it must be tendered to the person provided he is in the realm. But it is not necessary to follow him out of the realm. A man in Engd need not follow a man to Scotland. How far does this rule apply to this Country? Judge Reeves thinks the rule ought not to apply to its full extent in this Country. It has however not been decided. When I say that the tender must be to the person. I do not mean to say that you must follow his person if he should be from home. If the man is gone from home it is sufficient to go there to his house and tender. There is an exception to this in Engd in case of rent. tenders may be made at the Mansion-house. At Stewards house. At Bargain in which the place is fixed alters the Case. But a tender to the person applies only to Contracts for money and not for butchly articles. with respect to which the rule is. that they are to be tendered at his house. the house where he lived at the time the Contract was made. in this respect it differs from the rule relating to Money. But if it is no more inconvenient for the debtor to deliver at the new residence than at the old. then he must deliver at the new. Suppose a Creditor moves away a great distance. he may ordered be delivered at a certain place not more inconvenient than the place agreed upon.

5 Bac J
3 Bay 91
Coke Ch 211

I shall now consider the time the tender is to be made. The time commonly is fixed by the Contract. The time on or before the 10th day May. The legal time is on the last day. It means the same unless in certain cases. The tender must not only be on the last day but on the most convenient part of the day. some day before Sunset. as long as money can be counted by day light. The tender must be good on or before it made before. Best of the Creditor is met by the Debtor then the tender is good though before

5 Co: Rep 114
3 Lev: 104
Stra 777
Salk 624
Bro Eliz 14
Co Litt 202
Do 206

When the time is not fixed. the time of tender must be specified by the Creditor. It is his duty to give notice. Where neither time or place is fixed. then there is no rule. the Judge supposes he need not give notice.

9 Co: Rep: 92.
2 T.R 173
1 Salk 623.
Co Litt 24

A Bond is assigned over to whom is the obligor to tender. Would the tender be good to the obligee? A Courts of Eq will compel the tender to the assee. The Judge says that where a man has once acquired rights. In this matter tender must be made to him. The Judge says the assignment is not to give the obligor more inconvenience. But where the assignment gives more trouble. as where in town of Lion is to be delivered at B. and the Obligee assigns it to one at C. P. at B. being a Bankrupt. it shall not be delivered to him. the assee at C. must go to B. to receive his Bond. the obligee not being compelled to deliver ans where else

Moore 137

Actions on Contracts. Tender

Where there is no previous debt a tender discharges the debt. Suppose in case of a Mortgage. the money is tendered on the day. the title vests in the Mortgagor. - It becomes necessary however to get a deed. But if the day is elapsed. neither payment or tender. have any effect as to title. it gives the same an entire new estate in Chancery. - Suppose a man agrees to give another a deed if he make pay 100£ on a certain day. - he may compel him on day by tender to give the deed. - The Judge finds fault with the rule - that where a man is bound to do a collateral act. and he tenders to do it - he acquires the same rights. as if he had done it. The Courts at is carrying the principle too far. The jury says the plaintiff in such case have been directed to be agreeable in giving damages. Our rule is that if the fellow runs scanned off he had no other right than that of an action - It is a general rule that when a right is acquired by tender it is as extensive as a full performance. says the English rule -

Cro Rac 245 -

vt supra -

Cro E. 888
Lo Ray 1 684

Lo Ray 964
2 Burr 1352
1 Brownlow 71
2 Wms 877
2 Bl. Ca 206
1 Show 129
Cro Eliz. 755
2 Roll 523
2 Co 79
6 Co Litt 207 10.
11. all over

The Manner of pleading tender.

It is not sufficient that the last day that he made a compleat tender - he must plead the day - that it was the utter most convenient part of the Day - he must spread out the manner of the tender in person. It is held it is necessary that the

tender was refused to be accepted. The Pleadge says he does not think it necessary. If he was absent it must be stated. Where pay is to be on or before such a day it must be stated to have been tendered on the last day and the most convenient part of the day. But this is not enough. It must be stated that the Deft has at all times been ready to pay. and produce the money in Court. Where the article is weighty it need not be produced into Court.

1 Mod 5 261
1 Salk 31
9 Co Rep 10
9 J Rep 139
2 Ld Ray 687
1 Sauk 624
Cro Car 422
1 Salk 223
Cro Eliz 886
1 Show 458

If the Creditor is absent it is not necessary to state the tender was made. but that the Debtor was ready. If payment is to be made on or before such a day the mode of pleading is not altered. It must be stated that the tender was made on the last day. In case of money it must stated that you not only tendered to him. but that you are still ready.

1 Sid. 23.
2 Vents 106
9 Co Rep 79

When the Plff replies. he has a right to traverse any part of it. he may deny that the tender was made. or that he was always ready. and that he demanded it of him. and he refused. If a tender is made of goods or other things the Deft must plead that he tendered it at time and place but he never need aver that he always has been ready. There is a practice in England to admit the Deft to bring the articles into Court. as Books Jewels and Silks. The articles are regulated by the Court. This practice obtains more usually

Ld Ray 234
1 Salk 624

1 Show 297

3 T.R. 635
1 H.Bl. 479
1 W.Bl. 464
2 W.Bla. 874
Do 1174
3 Bac 692
1 W.Bla 40

en cases where the restitution of specific arti-
cles is sought after and not damages. A Court
of Law can never issue execution for specific articles.
The bringing of money into Court is admission of the
right of the Plff to as much. The English law does
not admit tender after right of action has accrued
but our law of Ct. does. at any time. The costs must
be tendered as well as the debt. The Judge believes that
the practice of tender at any time prevails pretty
generally.....

Insanity, is a defence to a right of recovery. This subject
has already been treated of under Contracts. I have
only to observe that in an action on a specialty it must
be spread on the Record. Is not a defence to an action
for a tort. Yes. The action for the tort does not proceed
at all upon contract. The only thing considered
is the injury done. Where design and malice are
ingredients to the action. No action can be had.
Thus an action for slander cannot be maintained
as a mad-man. Vide Contracts.

Coverture or Infancy is a defence in some Cases. vide
Contracts. If a married woman has given a Bond
she may plead non est factum. She cannot even revive
it by a subsequent promise.

Infancy is a defence to Contracts. Minors however
are bound to the extent of the articles which are
necessaries. For these they are bound only to the
real value of these articles. To a plea of Infancy
then. it may be pleaded that the articles were neces-
saries. The answer of the Deft is that they were. Then

Defences to Actions on Contracts — St. of Limitations

is another application which is, that the Dft. after full age renewed the promise. The original Contract was not void but voidable.

Incapability of performance is another defence. This has likewise been treated of under Contracts. Infants till the age of 7 they can do no crime. At 14 they are considered fully capable of doing mischief. Between 7 and 14 the enquiry is, was the criminal act capax. ---? So where the contract is an illegal one it is a good defence. But suppose it is a Bond how then. The particular circumstances must be spread upon the Record. Circumstances may be given in evidence under the gen. issue in a Dft. So where there is a total want of consideration. If it appear on the face of the Instrument it may be demurred to. But on a sealed instrument the particulars may be stated upon the Record.

Statute of Limitations.

The laws on this subject are very different but the principles are the same. ~~It is~~ It is said that certain Contracts the Stat does not run upon. or that it is taken out of the Statute If a promise is made within the time of the Stat it is said that the promise takes it out of the Statute. There are three different hypotheses on this subject. 1st That the Stat had made certain what before was uncertain with respect to the time being evidence of payment. The principle is say they. that the presumption of law was that it was paid. This has a very plausible opinion

Defences to Actions &c

Stat of limitations

says the Judge - The preamble supposes to the judge one correct. Let a man make a Will and order his debts to be paid - Debts barred by the Stat of limitations are always ordered to be paid - But this would not be the case if the law supposed that the Debt was paid - The cases in Ely permit the most decisive answer to this hypothesis - A man has been a Bankrupt and becomes a man of wealth, he then advertises that he will pay all his debts. He cannot then say to a man. this debt is barred by the Stat of limitations.

The second hypothesis admits that there is no such presumption - but that any promise to pay will be supported because of the prior moral obligation - If this is correct the action must always be brought on the last promise, but this is not the case -

Shall we consider the true hypothesis determined in the National Court which goes upon a principle of policy. that debts must soon be paid - The debtor may if he pleases waive the benefit of the law of he pleases - If he wont take advantage of it when he can. he loses the benefit of it forever. If a man says he will not take advantage of the Stat: he cannot, he has waived it - Very slight circumstances take away Stat of limitations - If a man pay a considerable part of a note before the end of 6 years - it is a waiver

3 T. R. 84
Comyns 548
2 T. R. 862
Gilbert's Law of Evi. 126
2 Ld Raym 744
2 Ld Raym 820
2 Ld Raym 880
Burr 2630
Cowp. 714
5 Burr
Bro Cas 381
Bro Cas 16

Defences to

2 Burr 1099
Pre: Ch: 385
Cro Car: 41
5 Mod 426
Carth 471 qu
2 Vents 152
1 Salk 29
1 Vents 161

Bob Ev 152

3 T. R. 454
5 T. R 519
2 Vents 560
Contra -

2 H. Bla 562

6 T. R. 189

when an act Done which goes to the acknowledgment of the debt it is good waiver of the Statute of limitations ..... Vide Benton vs McClean on this subject

Where there were two joint debtors and after the Statute had run. One acknowledges the debt it was held that it was an acknowledgment of both -- The Stat begins to operate on simple contracts after the right of recovery accrues. There is always a proviso in these Statutes in favour of married women infants and persons beyond sea - When the Stat has once begun to run, going off beyond sea dont stop it. or where a woman marries after the Stat has begun to run, it runs on. So where there is only of several joint debtors in the Country it runs. This affects every contract where indebitatus assumpsit would lie - in case of Contracts but not where it is founded on a tort - as the obtainment of money by deceit pendente &c In running accounts every item is to be applied to it however old it may be - unless expressly ordered to the Contrary ---

The Stat of limitations may extend to actions of trespass vi et armis slander. Such action cannot be taken out of the Statute - Suppose a man has been slandered. and there is a limitation of two years - but he does not sue out that he has been slandered properly till after two years subsequent to the speaking of the words. The action may be brought
[illegible] supposing the damage resulted within the

Actions on Contracts — Stat of limitations

two years. The cest of action in this case is that special damages sustained. and not presumptive damages. The Court cannot know what special damages they have sustained. There is likewise the Stat of limitations as to entry upon land. The Court. whatever bars an entry bars ejectment. At Com law. it does bar the title but only the title. There is a Question whether two limitations can run upon a chose. The Judge thinks there cannot be such a tacking on of limitations. altho. he thought to the Contrary formerly. Judge Parsons has determined has determined to the contrary. Map Resp

The Stat of lim. has always been used as a plea in bar. The Judge does not believe it is a plea in Bar but a plea in abatement. Suppose a Bond is given in York where there is no Stat of lim as to Bonds and sued upon in Court. surely there can be no plea in Bar to the Bond. because the debt actually exists. by two

The Construction and nature of the Contract are to be governed by the law where it is made — but as to the mode of proceeding on it. is to be governed by the law where it is sued. Suppose a man has gone into the Judges Court and takes his wagon he can bring trespass or Trover. But trespass is barred can he then bring Trover. The Com. law knows no destruction of right. and every stat of lim is an encroachments of Com law right. Trover may be brought

Defences to

Accord and Satisfaction.

When a Contract is entered into to pay a sum or to do a collateral act is accord and satisfaction. Payment strictly is the deliverance of Specie. and acceptance of any thing else is accord. This goes not only to all contracts but to all actions as for torts. Accord then is an agreement to receive some thing besides what the Contract specifies. When referred to Contracts and when to torts. something in lieu of damages uncertain as well as certain. In case of a debt due by Specialty. at Com law Accord & Satisfaction was no recovery. in single Bills. Here the debt proves by the writing itself. There is an old maxim unumquodque dissolvitur eo ligamine quo ligatum est. A Bond then cannot be avoided by an agreement not as solemn as itself. But this principle is done away by an english Act which puts it upon them to prove solvit ad diem & post diem. and to give payment in evidence by parol. And this Statute applies in full force to the Bond as the Judge supposes. In some of our States it has been customary to give in evidence.

8 Co Rep 44
1 Brow 136
Bro Cas 1/6
2 Co Rep 78
Bro Par 100
1 Mole 466 266

Accord with one of several defendants is a bar to all. With respect to real actions, Accord and Satisfaction is not a bar. it being impossible as I shall prove. There is no such thing as conveying real property without deed An agreement to convey in writing will be enforced in Chancery.

4 Co 1st
9 Co 79

This accord must have some qualities. It must be good satisfaction of the claim. it must be certain in its terms and must carried into execution

Actions on Contracts. Accord & satisfaction

By full satisfaction is meant that there must be consideration. A man brought an action on another for forcibly entering his house. the Deft plead that the Pltff consented that he might come in again. this is no satisfaction. Another case was where the Pltff sued the Deft for taking his cattle away. The Deft plead nearly as before viz as in the margen. Where a man took the pltffs cattle and afterwards the pltff told him if he would drive them to a certain place. it should be in satisfaction of the action. it was held a good plea. there being a consideration. The Court will not enquire whether the consideration was sufficient or not. Nothing except something in the nature of property can be a satisfaction. Asking a mans pardon. then can be no bar to an action. By an award of arbitration a man was to kneel upon his knees and ask pardon. it was held no satisfaction. But if the parties drink a glass of wine together it is good satisfaction. To agree to relinquish a house. the Ladye supposes certain enough. But where in satisfaction for an injury it was agreed to pay a quantity of wheat. it was held bad on account of the uncertainty. This contract or satisfaction must be executed. It is no bar to the action unless it be executed and the judge therefore on actions may be heard on such agreement.

1 Rolle Abr 6. 5 th
1 Rolle 128
2 Mod 86.
1 Sha L 226
1 Lev: 129.
2 Mod 86
1 Rolle 129.
Bro 8 198
305
1 Mod 169
2 Mod 74. the law on the margen

The manner of pleading accord and

Statute 573

satisfaction has been much altered - they say now that such a thing ones seven in satisfaction and taken in satisfaction -

Payment of money upon foreign attachment is the next defence - This is the Custom of the several States and is unknown to the Com-law - There is a difference on this subject in the several states - A may abscond from the State and owe B money. C lives in the States and owes A money - The effect of the Statute to secure the money to B which is owned by A and due to him from C - This is foreign attachment - and this may be plead in bar of an action vs C by A - Process is sent vs A. and serves it on C as the debtor of A - C cannot remit the money to A - if he does he must pay it over again by the Statute - If C refuses to pay - he takes out Scire facias vs C & garnishee to come into Court and there cause why he will not pay - It was a right to call upon him to discover by oath whether he owes A any thing or not - He is a Witness and B recovers to the amount that he owes A - The oath of the Garnishee is not conclusive - Where the money from the Garnishee is not due till some after - Scire facias cannot issue till that time - It has been decided here in Court that the Execution cannot be arrested -

No man can claim the foreign attachment for a debt - it holds only, cases of debt - where there is property in the rem always in cases

Actions on Contracts Second

Composition with Creditors is another defence ... and if it can be proved is a sufficient bar. Another defence is another judgment for the same matter and thing. The first is conclusive. A new trial may indeed be had in some cases as where trespass and trover for instance are concurrent. and a first has been obtained in trespass trover cannot be brought. To ascertain whether they are concurrent. If the same testimony which supported the former will support the latter. they are concurrent.

Another Defence is a discharge. a discharge in its technical sense is different from a release which applies only to a right which has accrued. a discharge to a right which has not accrued. A discharge will not without some consideration is nothing. and cannot be made use of as a defence. A mug of flip would be a good consideration. A discharge will only apply where no right of action has accrued.

1 Mod 215
2 Mod 44
Bro Bar 364
Salk 127
" 293

Payment is another plea in Bar. Length of time may be given in evidence. to presume payments. where there is no Statute of limitations at all. When a suit is brought for the full alleged performance is the proper term. When it is a question of law. Issues on it must not only that you did the thing but the manner. but when it is a matter of fact. plead performance simply

Defences to Actions

Accord & Satisfaction

Release is another defence. What constitutes a release has already been discharged. If the writing is sealed, it is good without consideration for the seal is consideration of itself. It is a release of all demands or all claims. It releases all rights of action in existence. It releases a debitum in presenti solvendum in futuro. It releases Bonas then & damages &c &c.

Cro Jac 487
Co Litt 91
Cro Eliz 300
Cro J. 606.

But it does not apply if it is a debitum in presenti &c where a covenant is broken after the release. A covenant cannot be released without the word Covenant. It will not vest where a renewal yearly as rent annuity. No collateral Covenant would be released. A release to one of several joint obligors is a release to all. Courts will sometimes construe the operation of releases. when there is something in the Contract which manifests such a disposition by the parties. The Ct will restrain or recover to do justice.

1 Salk 578
1 Ld 141 et
Co Litt 292
Cro Eliz 270
Co Litt 232
Co Rep 120

+1 Pow Con 377
3 B 2, 398
Earth 119
2 Wm Bla 577
Do Rep 235
336 +
664
2 Lev 205

Bankruptcy is another defence. Insolvent acts never apply to a debt except such as exist unless others are expressly mentioned. So a discharge of one partner is not a discharge of both. They do not reach lords. An insolvents act of one state it has been considered has no bar to the demands of another State. It has been once in this State determined otherwise occurs now. A judgt in one State is not conclusive in another so in Ex gone But in Cont. otherwise it is conclusive.

3 T.R. 703
4 B. & P. 94
1 Wheelw 244

1 Wm Bl. 499
3 T.R. 153.

on Contracts. Awards.

An Award may also be used as a defence. On this head I will point out what is not law as well as what is. At first the Courts were ill disposed towards awards and set them aside if they could conceive of their incorrectness. Afterwards they went over to the other extreme and confirmed them if they could conceive of their correctness. But afterwards Courts adopted a medium which is now in force. An Award is the judgment rendered by persons appointed by the parties who are called Arbitrators and whose decision (if correct) is a bar to all subsequent actions of a personal nature for the same thing. There is one exception at Com. Law which will be considered hereafter. The award creates a new debt and may be so sued on. The old rule was if the person neglected to perform the award after a certain time it ceased to be a bar. An award is no bar, whenever real property is concerned and the reason of this was explained under the head of record: which is that title to land must be by writing under seal. But there may be a good award without any sealed writing. In England they have made the holder of the land give bonds before hand. and made the Arbitrators hold them as Escrows. This would do if it were not for the maxim that no freehold estate can be made to commence in future. But in some of the U. S. where they have abolished or disregarded this maxim, this method might

be adopted. However at any rate they may make the land-holder give a Bond conditioned for the performance of the Arbitration, in which case, the Bond may be sued upon. But Criminal matters, or Divorces, or the Character of a man, are not arbitrable matters at all in any way -

Suppose the award made and the subject be of some collateral matter and not money, what is to be done? for these Arbitrators can decree specific restitution of personal chattels as a horse a picture &. The award vests the property of such chattel, and the winner may recover it as his. or have the award returned to the Court which lays a foundation for the interference of Chancery -

If they award that the left shall do some act, as build so much stone fence, and the left will not, an action on the Case lies against him in which case damages only can be performed recovered for non-performance -

If the award be of money an action of debt lies on the award -

It has been a doubt whether Trover will lie. When a Bond for performance is given. and the Arbitrators decree restitution of some specific property -

The advocates of the negative say that recourse ought to be had to the Bond and not to the original cause of action but the Judge thinks Trover will lie or debt on the Bond as the Plaintiff chooses -

Actions on Contracts Award.

If an award be determined contrary to the laws of the land, and this appear on the award itself it will be set aside. Arbitrators have power to apply to the Consciences of the parties themselves by making them testify. An award may be enforced 1st Where the parties make an express promise to abide by the award: in which case they are liable on an assst 2nd where they give Bonds conditioned to abide by the award. in which case they are liable in an action of Debt. In Connt they give rules of Court. There is a practise in some of the States which is untenable. and therefore given up in Connt. this is, where a party confesses judgment before a Court or Justice. and enable the Arbitrators to destroy these judgments according to their own decision. but this is a bad way for the loser of the award cannot help himself against the judgment standing in the hands of the Arbitrators. for before he can look round the Sheriff will be after him. Yet can to be sure get an Audita Querela. but this is only a matter of favour and not of right

The agreement to submit may be either parol or written and is sometimes made with the intervention of a Court in which case it must be written) sometimes without. The advantage of the first is, that an attachment will issue to enforce obedience. on the process of contempt

of Court. This remedy is merely cumulative, for the party may still have an action on the award. (Can't they issue execution on the award.) The first Statute on the subject is that of 9 & 10 of William 3rd. Before that time awards were not much used. This Statute is copied in most of the States. Where there is a submission by parol and nothing else, I will state how the law was all along, and how it is. In old times the award created a debt if it was of money and an action lay, but if it was of collateral matters there was no remedy. Afterwards they said that when there was a consideration to the promise to submit, a recovery might be had although it was of collateral articles. And now it is no matter whether there is a consideration or not.

Lyd on Awards 90
2 Roy. 248
— — 122
5 Mod 35
2 Roy. 960-5
Do. 1039
1 Salk 76

When a Bond is given to abide by the award you may sue either on the Bond or Award. It is only when the Bond is given for the same debt, that it swallows it up, but in this case it does not. The Bond may be given to any Body as Trustee, and it is not necessary to make the party the obligee. Some have said that when the promise to abide is in writing, the award must be so too. But this is not so. The extent of the submission and the time when it is to be made, depend upon the parties themselves.

Actions on Contracts. Award.

An award is in its nature revocable. that is either of the parties may revoke the business on paying Costs. at any time before the decision is pronounced. But the Judge thinks if the Drawer knew what the decision would be, it would not be just to revoke. At any rate he would have to forfeit the Bond if he revoked. The whole penalty is forfeited. but it may be chancered down. Partners often agree to refer their disputes to Arbitrators and the effect of this clause has occasioned much controversy. But it is now settled that such a clause cannot be pleaded in bar when suit is brought before Arbitration. for the parties cannot oust the Court of their legal jurisdiction.

Ky D Ann: 16. 19

7 J.J. Marsh. 72
8 J.J. Marsh. 37. 87.

1 Ky D 18
1 Littl: 281

The old law was. that where a Bond was given to abide by the award. there could be no revocation of that award: but this is not now law. The Bond may be forfeited without an absolute revocation. A revocation is where one party refuses to proceed and rescinds the arbitrators authority, for a neglect to attend, amounts to a forfeiture

8 J.J. Marsh. 139
1 Bibb: 129
2 Atk: 569
2 Bro Ch 336
2 Ken Abr 606

I will now consider the cases of persons incapable of submitting to an award. A Woman or Feme Covert cannot bind themselves by submitting: but an Infant can get a third person to give a Bond for him. that he will abide. The old

8 Geo: 82.
1 Brown 162
2 Do: 290

5 Geo: 17
Comb: 318
Salk: 270
1 Salk 20
5 Geo: 17
Ky D 23

Defences to

rule was. that even their Bond was void. but now it is good. The submission of an Ex or was also in former times void. it is now held in some cases only. where the Executor loses or gains more by the award than he would have lost or gained in Court. the award goes for nothing. It has been held that Bankrupts can submit to arbitrament but I think this only proceeds from an English Stat enabling them so to do. It has been made a question whether a partner can submit to arbitrament without the consent of the other. but it is not in the articles certainly and the Com. law knows of no such thing. Where a Ships brew appointed agents by parol to manage the business with power to submit and they did submit and the award was agt them. the Ships brew went to get off but they could not. the doubt was whether the power should not have been sealed. In this case the agents were interested. but if they had not been they would not have been personally bound by the award. for one acting under a power does not bind himself. But if an atty submits a cause to arbitrament (except where it is by rule of Court) he is personally bound and not his client. Where a husband submits a suit about the property of the wife to arbitrament. the submission is void as it was such property as he

18. R. 691
1 Dyer 216

Hyd: 23

2 Mod: 226

Hyd: 25

1 Dyer 216

Cro Jac: 447
1 Roll: 269

could dispose of e.g. an annuity for her life. or her land. but of the choses in action as notes the submission is a good one. In Rolle it is said that the Wife would have been bound if she had joined in it. but this cannot be true as it is contrary to all the authorities in the Books. It is said that when an award goes vs a man and he dies. no action of debt lies on the award vs the Executor: the reason of this was. that in debt a man might wage his law and the Ex^or could not wage. but now the Ex^or is liable. There was an exception mentioned some time back to those things that were the subjects of arbitration on this is where the debt is a sum certain and grows out of the instrument as a Bond or Covenant on the idea that there was nothing to submit. But the fact is that the award was of a lower nature than the Debt itself and of course could not extinguish the debt. whereas in other cases the award extinguishes the original debt.

Cro E: 600
2 Vent: 269
1 Ld Ray^d 248

6 Co: 43
1 Lev: 292
Cro E: 422
Cro Jac 99
1 Keeble 937

As to real estate also it was formerly doubted whether an award could be held upon it. This has been before explained. but the opinions in the Books are a perfect farrago. One Judge said the award ordered it only. another that it passed the land. another. that it passed it only where the submission was by deed. But since a Case in Ld Raymond 115 there has been no doubt on the subject.

Th Jones: 168

References to

Who may be an Arbitrator.

The rule is, that persons not of sufficient discretion 2dly. under the control of another 3dly Attainted persons, cannot be Arbitrators. Under the first are included Idiots & Lunatics but whether it includes Minors, is a subject of much dispute. The Judge thinks it does not. for Minors may bind other people generally (except where an oath is to be taken) by their acts though not themselves. The deaf and dumb are included.

Under the second head married women are included, though says the Judge they are sometimes under no body's control. A Slave is also included. A man may be Arbitrator in his own case if the other party consents. Sometimes an Umpire is introduced. This is one who is to decide in the case if the Arbitrators should not determine or agree and is appointed by the parties or Arbitrators. But the Umpire must not be appointed by Chance. Where there was a submission to A & B. and if they do not agree by the 1st Party then to C. provided he decide before the 1st Party. there was a great dispute. The old law was that the appointment was void as to C. but this is not now the law. for if an award is made by C it is evidence enough that A and B could not agree. So where C had further time and

Kendrick 43
2 Vern: 100
4 Mod 175
Comb: 218

2 Vern 485

made the award before his own time begins (as if to A and B provided they agree by the 1st January, and C provided so the 1st of Febry) it was at first held void but now it is good. so that C may decide en bebec. 1 Lyd 2. 7. 95 2 Keeble 262 332

The old idea was that Arbitrators (where they had power to appoint an umpire) could not appoint before them even authority expired but now such an appointment of an umpire is the first thing that the Arbitrators do. 1 Lyd 50 2 J. R. 625 1 Ld Raym 671 1 Salk: 71

It was also a question whether they could nominate again when the first umpire refused to act. but it is now settled that they may. Arbitrators appoint their own time and place of meeting. They can proceed against a man when he does not attend. 2 Vent 113 1 Salk: 70 1 Ld Raym 222 Cowp 8 quots 2nd part 63

It is strange that the practice and decisions are op- posed on this point. Whether the Arbitrators may do half and leave half for the umpire to do. The power of Arbitrators is joint and of course unanimity is required in their award but if the parties choose to submit to the majority of them, it is good - but even then the third person must be present and give his opinion, unless his absence was wilful. It was doubted whether when the parties submitted provided it was delivered at a certain day, it did not mean a written award as in other cases can be delivered: but the Court seem in favor 1 Lyd 64 1 Lyd 67 Barnes Note 57 1 Lyd 75 6 Mod 160

award might be delivered: and after words in another case said that a final award might be ready to be delivered - guided by the former case

It is often said that arbitrators cannot reserve to themselves any power: but the fact is that they can reserve any ministerial power. e.g. suppose they say that more shall be paid if proved due. this is an illegal reservation for it is in the nature of a judicial power. but if it had been ministerial power, such as attendance to measure land at a future time, it would have been good -

Salm. 110
Do 146
Lloyd. 78
Do: 81. 83. 84
12 Mod 139
Bro Parl Cas 315
2 Atk: 501
Hardres 48

And so also of a delegation of authority, they Arbitrators cannot delegate the judicial part but they can the ministerial part of their office - but the person to whom it is delegated must understand the business and not be a stinker - for this would be unreasonable -

1 Salk 75
1 Sid: 358

2 Sid: 1025

It has been made a question whether an award to stand by a former award is good - but the law seems to be that the award is good

An award must be according to the Terms of the submission. But this Rule has many branches and 1st It must not take in Controversies that are not included by the submission. It has been said that arbitrators cannot award a collateral thing such as picture &c for that this would be out of the Terms of the submission. But the authorities will not warrant this. Indeed if the case be one of Slander, they

1 Lev 74
1 Sid: 12
2 Roll 1039
6 Mod 221

can award a bay horse in satisfaction of the
injury - In one case they awarded that one of
the parties should cook two ducks for the
others dinner - They may also award a Bond
to be given by one of the parties - As where one
claimed to be exempt from tythes - and the 1 Bla: R. 475
Person sued not - they found the man was exempt
and thus determined the right - They can also
destroy a Partnership or Apprenticeship -
It was formerly held that they could determine 2 T.R. 645 -
rights but merely facts of awarding &c, but now 3 D.O 626
it is not so - So it was once held that they
could decide collateral matters but now it is 1 Lyd: 99
not so. In this first branch there has been
much dispute whether they could award that
one should give a release to the other up to
the time of the award given. This was held void
because some quarrel might have arisen be-
tween the submission and award. After
words they held it good unless such quarrel was
shewn. But now if a Release is given up to the 1 Lyd 165
time of the award it does not at all effect 10 Co: Rep: 132
such intermediate quarrels.
The 2nd branch of the Rule is that the Award
must not extend to any one who is a stranger to 1 Mod C
the Submission. The old rule was that if a stranger Cro Car: 541
was brought in, the whole was void. But now if 1 Lyd: 105 -
a reason can be shewn for so doing it will be 5 Co: 77
good. If it be beneficial to the parties it is a 10 Co: 131

sufficient apology for the introduction of a stranger - Nor can this award any thing to be done by a stranger -

Another rule is that the controversy must be decided - This rule however is liable to much qualification - But where the submission was of all disputes about property personal or real & there be no award at all about real property still it is a good award: unless it is shewn that there was some dispute about real property in esse which was left undecided - And so if the submission be of all suits and there be but one suit decided it is good unless it be shewn that more were brought up - An Ita quod makes no odds - But suppose the controversies are named specifically and one only is decided: Why then the award is good - unless the submission provides that all or none shall be decided - but in this case the award is no bar to actions brought on those suits or disputes which are left untouched - Where specific controversies are decided and the submission says that all or more must be decided and the Arbitrators decide all these and one more, it is good as to all except this one as to which it is void - But note, that if this one forbidden one be brought in, as it sets off, the whole is void - An Ita quod means that all controversies are to be determined - If the Ita quod be put in the submission

8 Co: 98 — Dispute about property personal or real

Bro Eliz 858 / 8 Co: 98 / Bro Jac 200 / Do - 356 — Award of all suits

4 T.R. 146 - Fawr 274 — Ita quod makes no odds

Lutw 1146 / 120 / Cro Car 216 / Hobt 49 — Award of all or none

and one of the disputes mentioned by A. be left out is the award, the whole is void -

The Requisites of an Award -

By requisites we do not mean extrinsic qualities but such as every award must have. And 1st They must not award against law - As if Nokes call Stiles an ugly scurvy dirty fellow. No action lies at law for these words. And Arbitrators cannot award damages for them.

2nd The award must be possible - By this is not meant every impossibility but only physical ones. For if they say that A shall B. 100£ and A never had a cent in the world it is impossible for him to pay all this but the award is good. The award must also be reasonable - So if they award that one go into Service it is unreasonable or if they order him to pay a penalty such as the Jews suffered, it is bad. But if the thing can be enforced by law it is never unreasonable. thus if the award be that a cestui que trust procure his trustee to convey to some body. It is good for he can be forced by Chancery to convey. " " " "

Another quality of an award is that it must be certain Where an award that to much fund. a Bond should be given for the debt which was found a 100£. It was used to be uncertain, Coot being said how large the penalty should be. The Court held it certain because

1 Roll 120

The penalty is always double the Bond.-

2 Bl Rep 1076 You may be referred to the thing in dispute for whom the award is found &c. ascertain whether certain or uncertain. Where there is a rule to ascertain by- there the award is certain. As when the award is to pay the Costs of suit- It is not uncertain because it is conditional. The award was that A should occupy B's house on condition of paying 30£ annually.- An award may be made with a penalty- as awarding a thing to be done. if not so much to be paid-

Cro Jac 428

2 Keeble 828
12 Mod 586

If no time is fixed- it is to be within a reasonable time.- Whatever uncertainty there may be you may help and by uncertainty by averment. But averments cannot be made where there are no standards-

Cro 3: 676
2 Bl Rep 612.

An award to be paid must be final by this is meant that the Controversy must be ended. Where the Award was that the Plff should be nonsuited- it was bad. Another award that a man should enter a Retraxit & Release put forever by Common Law bars a suit- this then alters the case. In case that all suits should cease, the award is final- and good. Where the award was that he should not sue or cause it to be paid- it was not decided. The Judge thinks it to be final.

6 Mod 232

1 Keb 142.

2 Stra 1064
6 Mod: 33.
2 Bl Rep 961.4.

Comb 456-
1 Lev: 59
Salk 110.

2 Stra 1082
1 Ld R 73-
6 Mod 236

And award must be mutual and advantageous- The old idea was to make an award mutual

Hobt. 49

it must be on both sides. The presumption now is that the award was made upon the subject submitted. The rule is that when an award is made after a controversy it shall be presumed to be on that controversy, unless on satisfaction of the enquiry of it. ----

Com Dig. 228

Formerly performance of a thing to be done, in satisfaction of all controversies was bad. now otherwise. An award to pay 10 £ in full of all demands. was bad. now sees us. So a Release of all controversies wth to the time of the award. was bad. The ancient reason was that if an award was bad in part. it was bad in the whole. The rule now is that its being void in part will sometimes make the whole void. and good in part it will stand so far.

Farmer 108

If A have claims and B is awarded to pay A which is different to A 100 £ in satisfaction of his claim. and he is also awarded to pay A 10 £ for a controversy not in the submission of A only demands the 100 £. B cannot say that the award is bad in part. and therefore he will not pay. But if A demands the 110 dollars then he may make the objection and it will be a good one.

If the party against whom the award is made is willing to perform the void is void as the good part. the award is good. The other party never can object to it. --

Where there are several claims submitted and the arbitrators take into consideration

2 Roll Rep 46
2 Lev: 6
Cro Jac 684
Do 639
Yelv 128
2 Saund 293
Cro Jac 252
1 Lo Ray 114
Freeb 166
Lo Ray 185
12 Mod 547

matters not submitted. and make a sum ex-
gross their award - it is void - utterly - But if they
specify particularly - and embrace a case not
submitted - the void part is void - but the rest
is good. If the multiplicity be presumed which was
intended the award will be good although the
thing is not done.

The form of the award needs no very great
particularity now - it was otherwise formerly.
If there is any thing in the submission which
requires particularity, indeed it must be
particular.

Barnes Notes 66

The Performance of an Award.

The rule on this subject is very liberal.
Where the award was that it should deliver &c -
Bull up - a Copy was held sufficient. So where
was awarded to discontinue a Cause - a Release
was entered - If Money is awarded and no time
Sho 90. is limited it must be paid within a reasonable
time.

If there is no bond or Covenant to abide by the
award, the action is founded on the express promise
If there is one or on the implied promise, or for
debt. The Plff states there was a certain controversy
between him and the Defft. that it was submitted to
Arbitrators and that they met and then states
the award. He then goes on to state that the Defft
did not perform the award. &c. The whole of it must
be stated.

Actions on Bonds & Awards

and what the awards requires to be done must always be stated to have been done. If a breach is assigned it must always be assigned for that part of the award which is good. if not it is bad upon demurrer.

If a Bond has been given to abide by the award it need not necessarily be sued upon. you may still sue upon the award. The general practice now is to give bonds to abide by the awards. The ordinary mode of suing is to sue upon the Bond. The Deft may crave oyer of the Bond & say that no award was made. By no award is meant that it was not such an award as could be recovered upon. If then the Pltff replies that there was an award made & what it was & assigns a breach of it. If the Deft means to prove that there was no award in fact he rejoins that there was no award & states particularly. If he means that the award was not legal then he may demur to it on the Pltff's replication.

If the condition was that it should be made by a certain time & the Deft wishes to take advantage of that circumstance, he then pleads it was not made according to the submission and that he is not bound by it.

If the Deft first pleads that there was no award & the Pltff replies there was & sets it forth the Deft cannot then plead performance for that would

Hamm 233
Cro E 540
Keb 941
" 203

Stra 923

Lyth: 186
Hard 192
2 Saund 231
Cro Car 275
Do. 220
2 Mod 77
1 Salk 135
Ld Raym 1497

1 Hob 114 Hetley 178 2 Mod 71

be a departure in pleading.

Where the law requires the Plff to do something before he can recover upon the award, and where part of the award is void - he must state particularly.

12 Rep 114 123. 234 2 Mod 309 Yelv: 153

If the defence is that you did not submit you must plead non est factum to the Bond - in the first instance. There must always be a breach assigned or the Plff cannot possibly recover.

Cro Jac 300 Cro Car. 640

you must state a request. If the award is of that nature The Judge has never seen any stat[ute] limitations for actions on awards - in any state of the Union.

The Deft may plead that the whole controversy was not decided the Plff replies and sets forth the award & that it does decide only what is brought before them. The Deft rejoins that there other before the arbitrators of which they took no notice. this is a good answer.

Cro Car 258

If one is sued upon a Bond and the authority is revoked the Deft may reply over that the Deft revoked the authority - and recovers -

3 Wils. 512.

vide 3 Wils. 512. The Judge does not see how it was a question.

Sid. 106

When a submission is made by the Court you may sue upon the award, or upon an attachment - Chancery interferes where awards have been made only in cases of the frowardness of Justices. Chancy will enforce the performance of an award for a collateral thing - Where the submission was not by the Court the leave the parties to such redress by law - Chy never enforces awards as such but merely on the ground of subsequent agreement, Lee v Alt 714

2 Vern 643

3 Wils: 187 Hyd 219 Pre Ch: 218

Rep. Chan: 20. 2 Vern. 24

Motions on Contracts. Awards.

~~1 Atk 24~~

Courts of Eqy have where an award has long been ac- 1 Rep Ch 46
quiesced in where it might be aside laid the parties
under an penalty, not to go on. - - - - - - - - - -

Extrinsic causes that render an award void can
not be taken advantage of in a Court of law
except where it is made a rule of Court. This
is the English law. After the petition has refused 2 Vez 315
to set aside by the award. the Ct in such case will 2 Bels 149
upon an attachment. In this State. they suffer ex- 3 Atk 523
trinsic causes to be taken advantage in a Ct
of law. Cts of Eqy do not interfere where the sub-
mission is a rule of Court. The Judge sees no reason
why there should be an application to Eqy -
however that is the course of proceedings.
Where two of the arbitrators were prejudiced vs. 2 Vern 515
one of the parties they excluded him - by
hearing when he could not attend. Eqy set the
award aside - So where the Arbitrators met pri- 2 Vern 485
vately with one of the parties frequently.
Where the arbitrators had power to choose an
Arbitrator but could not agree upon person.
they would both agreed on giving the award for 2 Vern 101
A - but could not agree upon the sum - they 2 Vern 251
agreed upon a person as umpire - he sent guessed
what sum his master would award - held bad in 3 P. Wms 362.
Eqy vide as in margin - 101 Vern. - - - -
Where one of Arb. had shown a determination before 2 Ves: 316
hand to give the award a certain way - Eqy set it 2 Ves: 216
aside - vide 2 Barn Rep 463

So where the Arbitrators had an interest that the award should go a certain way and gave the
2 Vern 151 according to their Interest. It was set aside in
Chancery. Upon the ground of policy. One of the
1 Atk 77. parties may so conduct as that Chy will set
aside an award in his favour. Legal objections
Ld Raym R 345 are not discussed in a Bt of Chy. A Bt of Law is
tribunal for the trial of such objections. If the
3 Atk 496 Arbitrators have made a mistake in law or in
2 Vern 451 fact and it appears upon the face of the award.
Equity will set it aside. Insurance causes are
pleaded in bar.
The idea once was that if the award was not
performed it could not be pleaded in bar. And of
course performance must have been pleaded.
But this idea is now exploded. And performance need not be pleaded except in two cases
Com: Dig: Pleader 2 C 1 Mod 268 Com: Dig: 528. Ry. A: 280. before mentioned.

Judge Reeve.-- Private Wrongs. Slander

Slander.

Slander at law must consist of a charge certain, false and malicious.- By malicious is not meant that there should be a spirit of ill. will but that the charge was made with improper motives. By malice is meant mere wantonness- it is well expressed by the law term malitia.- If you prove the words you prima facie prove the malice.- But the malice may be rebutted- A man may prove that his character is good.- The charge of the deft must be false. But the deft may come in and prove that it was true- and if he so establishes the truth of the charge no damages can be had against him. There are two species of Slander. There are some which are actionable of themselves and some are not.- Of those which are actionable in themselves one class of words is that which will put a man in danger of the law. If the charge subjects a man for a crime to the punishment of the law, it is actionable per se. Thus if one calls another a thief.. theft is punished by law- and the words are actionable per se- If a man is charged with ingratitude or lying it is not actionable per se for those crimes are not punished by law-
The next class that is actionable in itself, is words directly to deprive one of a man's livelihood. If one says a man per es a villain, this would be actionable for it

destroy his business. But if the same charge where made of a Physician it would not be actionable for it would not go directly to his livelihood-
Dicons if you call him a Quack.
When the words are spoken of a Magistrate to charge him with want of integrity
The fourth class of words are those which charge a man with having a disorder which would banish him from Society - as to say of a man that he has Itch.
Where special damage can be proved it must be stated in the declaration. This is where the words are not actionable in themselves -
It is said that words of passion are not actionable. But it is not because they are words of passion but because they do not come under the former heads -
On this subject the law has undergone a great change of late. There was a time when actions for slander were much discountenanced. They had a maxim which cleared every man of bad intention The maxim now is that the words are to be understood as mankind generally understand them. you must take into consideration the whole conversation. So where a lady sued a young gentleman for calling her a thief - It appeared in evidence that he said she was a thief for that she had stolen his heart. It was held no slander. The Judge says stealing of hearts ought not to be felony -

Private Wrongs. Slander.

It is not material that the words charge should in all cases effect a mans reputation. To be actionable the charge is a crime which subjects to a fine, and effects a mans reputation it is actionable. But if it subjects to a fine but does not effect the reputation it is not actionable,- Thus in the last case it is not actionable to say of a man that he burned his child in linen. is not actionable. A charge of treason is actionable,- you will remember the words must be used in such a sense as that a crime be charged- So too on the other hand a word conveying no charge at all may be construed into an actionable charge by reference to the conversation in the whole- It is no matter what the language is. if the charge is meant to be made- Charging a person merely with an inclination is not actionable. But still the words expressing an inclination taken in connection with other things may be actionable. Is a charge of murder actionable if the person represented to be murdered is alive! The Books say no- for there can in this case be no murder. The Judge thinks this is not correct- There was a similar case of this kind in Connecticut- and the Court sustained the action- The Judge thinks it is no more necessary that murder should actually have been committed than in case of theft- a man should have stolen- Perjury- to constitute it such must be given before such as have a right to administer oaths. If a man says of another he is forsworn- this charge will depend upon the conversation- if that had been referring a suit- it would be actionable-

Bac. Ab. Slander

1 Roll. 72

4 Co: 15
3 Lev: 116
1 Rolle 39. 69
Bro Car 268.
Bro Jac 158

A charge of perjury against an officer for breach of his duty is not actionable. a charge of breach of his office doth. It chargeable or not according as it is punishable or not.

In case of Forgery. there is nothing materiae here. In the Declr the Plff states he was of good name fame and reputation. Character may not generally be enquired into. unless in issue. In charge of theft for instance. his general character as to stealing is enquired into. So too in other cases. as forgery. for instance. you can enquire only as to his character for forgery. A general charge is now actionable but formerly otherwise. So too to charge a man with eating leaven is now actionable. To charge a person with a witch or a Buzzard. is not actionable now. because it is now punishable. To charge a man with adultery in England is not actionable but it is in Const. for here et subjecta a man to the punishment of having a halter tied round his neck and here thirty lashes.

Hobt 331.
Bro Jac 114
Dira 14 2.
Bro Jac 39.
Bro Jac 674
2 Vent 251
10 Ray.
2 Lev. 91.

It is said that to charge a man with a crime of which he has been pardoned. is actionable. because he is worse now. But the Judge thinks differently.

Hobt 81
1 Dira 304

The next class of words actionable in themselves spoken of men in office. the law on this subject has the same ground as the law of scandalum magnatum in England. To say of a judge he is a corrupt man. is actionable. To say of a Judge he is a half eard fellow is actionable. Such words must all be spoken concerning his office.

Private Wrongs.

Slander.

The Cause therefore that words charging a Person with want of ability or integrity in his office are actionable in themselves.

Words affecting of particular professions which go to destroy a mans means of livelihood are actionable. So charge a physician with being unskilful is actionable. So charge a Clergyman with being a drunkard is actionable. Thus words go directly to drain the sources of livelihood. So to say of a clergyman he is a Rogue and a Roger is actionable. So say of a lawyer he knows no more law than a goose is actionable.

The other class of words is to charge a man with having a disease. The words must be in the present tense or the preterable that they go to keep a man out of company. In case of words actionable in themselves the Pltff need not state in his declaration any special damage but he may if he chooses. Words not actionable in themselves by averment of special damage are actionable.

Any charge whatever that so affects a mans character that he cannot transact business as before is actionable. The charge of want of Chastity is not in itself actionable. but if by means of such a charge a person loses a marriage. it is actionable.

Formerly the rule was that charge must be proved precisely as laid in the declⁿ but that is now the case. When the words are actionable in themselves

6 Mod 270
1 Molloy 92
1 Lev 282
Cro Car 222
Cro Jac 210
Latch 269
1 Salk 695

3 Lev: 17
Comb. 253
Stra 946

2 Vents 28
1 Pole 24
Cro Jac 285
1 Lev 115
Cro Car 585
2 Ray 1117

Cro Jac 114 & 30

2 Ed Rep 1
Cro Jac 623
Latch 218

2 Roll 98

Bul & B 87

Private Wrongs.

Slander.

B. N. P. 5.

B. N. P.

1 Lev: 82
Cro Jac 91.

2 Co: R. 14
Cro: C: 230

1 Roll 38
2 Burr 807
Parmer R 68

2 B & C 510
1 Lev: 277.

Salm 68

Salk 697

Fulton 2
Cro Jac 247
2 Vols: 300

12 Co: 134

1 Vent: 159
Sanders
1 Vole 64
1 Lev 277
2 Lev: 150

selves you cannot prove special damage unless laid in the declaration. Where the words are not spoken in malice they are not actionable. As where a man gives a character of a servt. So words that are actionable if spoken without malice are not actionable. In legal proceedings where a man brings a suit without malice and pends it for libel slander will not lie. So witnesses are protected in what they testify. Indeed legal proceedings are always protected. The same is the case with respect to Counsel in arguing the cause before the Court or Jury. But he may not therefore say what he pleases. he must not go out of the Record to accuse the best of a crime. A man is liable for slander if he reports the story. There are some authorities which say that if they prove that the story came from another they are not liable. . . .

To say to a man you deserve to be hanged for stealing is actionable. So where one says to another you can afford to spend money because you can counterfeit. was held actionable. Where a man said of one in gaol on a charge of theft. he is in gaol for stealing a horse. it was held not liable. for want of malice. But where one was in gaol for debt and P.S said of him. he is in gaol for stealing ducks. P.S. was held liable. because of malice appearing. Where a man says I guess P.S. stole them. he was liable. 1 Bents: 256

Private Wrongs. Slander.

Words that only show an inclination can never make a charge as to any of a man, he is thief &c. A says to B. either you or C. or D. stole a horse. There may be circumstances by which C may prove that he was intended, and then it will be libel but those circumstances may not exist. Cant phrases are as actionable as any other words although they may have different meanings in different parts. You do not know the meaning in the declaration. Must obtain it from the witnesses. Where A man says that he is as arrant a thief as there is England. It must show in his Declaration that there are thieves in England. If there are two Counts in the Decln one action will and the other not. and there is a general verdict. then rule is. the presumption is that the Jury under direction of Court gave the whole amount upon the good Count. But if all the words are in one Count. the presumption in that case is as strong as the other. That the other words are mere matter of aggravation. There is however some difference on the subject. But the latter opinion now is that the verdict stands. Another rule is. that words not laid in the Declaration may be given in evidence to prove malice. but no damages can be recovered for them. and an action can after words be had for those words.

1 Lid. 37
1 Rolle 47
Carm. 64

1 Rolle 75, 80
1 Rolle 84
Bro. Jac 170

10 Mod 198

Hobt 126

Cro. Eliz 250
" 855
1 Rolle 74
Cro. Jac 90

Sawyer R 266

Bull N.P. 8.
Ellen. 1200

B.N.P. 9

Private Wrongs. — Slander.

L. Co. 13.
Cro. J. 91.

The Deft may justify, give in evidence that the words were true. Where there was a family of the name of Box. and D said that the Boxes were traitors. held not actionable. because it could not be averred whom he meant.

That the words are true is a defence. but it can never be given in evidence undergeneral issue by Com. law. The meaning of not guilty is that the words were not spoken. or that there was no malice. It is said that if you prove the words, you admit the malice and that the words were spoken. The Judge thinks that the Deft ought to be permitted to show under what circumstances the words were spoken.---

The evidence must support the charge the Deln. The Plff first states his character fame good name and that he was always free from the abominable crime charged. The Judge thinks that this is not necessary. tho' he can always impeach it. He then goes on to state that the Deft envying his happy condition out of mere malice spoke the words. The presumption of the word malice will be cured after verdict. It is common to assert both that it was in the hearing and presence &c. It has been held that openly and publickly after verdict was good. It is very often necessary that the words were spoken of the Plff. at Plff need not aver his situation in life. as that he is a Captain. When the words are spoken generally

Private Wrongs.

Slander

to the Plff an averment is not necessary. It is usual to state that the Plff lost his friends and that he has been damnified so much. But this is not essential. says the Judge. where of the action is brought by a man in office. he must state that he was such officer. So where a suit is brought by a man of a particular profession. he must state the profession. The declaration must show publication. you must make averment that the words were false. and they were spoken with malice. The statement in the declⁿ must be definite. though the proof need not tally exactly with the words laid. other words proving the same thing will do. you must allege them to be spoken of the Plff. unless when spoken to him. as he meaning the Plff &c. Where the deft is speaking by way of description. as your son is a thief. you must aver that colloquium was with P.S. and the Plff was his son. There is no need of an averment when there is a charge made in drawing the declⁿ there is an innuendo. which goes to show the person or thing spoken of. as he burnt the barn. what barn shews the one spoken of. P.S.'s barn. but you cannot make thus to mean a barn full of hay.—

An action of slander can never be brought by two persons. for the slander of one is not the slander of another. Slander is not punished by the Law. Common Law & Crimes.

1 Selw. 157
Cro Car 282

Holt 268
Cro Car 861

Moore 459

2 Wandsworth Rep 305
Cro C 645

1 Roll 85
Cro Car 126

1 Sid. 53.

Str 666
2 Mills 114
1 Roll R 72

Private Wrongs.

Slander.

Slander is a crime in Comm. but the Stat is dormant. - - -

Libel.

Slander is by word of mouth. Libel is in writing by picture. Every slander when reduced to writing is libel - but not e converso - In an action by the parties the truth may always be given in evidence - but not so in case of libel by public prosecution. To say a man is a liar is not slander but to print it is a libel - In Case in 2 Wils 403 is a leading case on the subject where it is held that to print of a man that he is a rogue &c is a libel (+ Where the modern authorities are cited and examined. -)

2 Wils: 403.
+2 Johnson 74.
1 Salkeld 583.
Cairns' 17 Cases 194.
5 Mod 165
2 Ld Ray 1115
5 Geo: 125.
Moore 626
Cowper 470
2 Hist: 146.

The libel must be published to make it actionable. Where a man writes some libels and locks them up in his drawer it would be no libel - nor would it would be if they were lost, unless it was intended they should be lost - Where a man writes a letter to another and libels him a prosecution may be sustained for it has a tendency to break the peace - It is on this ground that the public interfere - Where this letter was sent to a third person, the person slandered may have an action of slander vs the writer. The Judge thinks the rule is carried too far when it is held that you can not give the truth in evidence on a prosecution by the Government. The Judge thinks that principle is

not founded on the Common law. In the Petition law they made an express provision that the truth might be given in evidence. And it is supposed that the repeal of this law restored the Com law as it stood. Truth may be given in evidence by the Plea of almost all. There may be more than one in a libel. it may be maintained vs. a number.

5 Co. 125. More Re 813 9 Co 59.

Malicious prosecution.

In this case you recover upon the ground of your character being wounded by a malicious prosecution and for the expense you have been put to. You cannot maintain this action till the old prosecution is at an end. An acquittal is not absolutely necessary now though it formerly was. There must be a want of probable cause to entitle a man to this action. No matter how great the malice of the man if there is probable cause he is safe. As to what may be a probable cause is meant such a fact or such a concurrence of facts as leads the jury to believe that there was reason for the prosecution. But if the fellow knew to the contrary notwithstanding the general belief it is not probable cause. It has been said that there can be no probable cause unless there has been a felony committed. The Judge this cannot be law and founds his opinion on several cases which he relates. The probable cause will be presumed

B. & P. 10 1 Selk 65

Mal. Pros.

Private Wrongs.

Vexatious lawsuit.

13. Ch. J. in cases where there has been a bonding over...

Vexatious lawsuit.

This differs from malicious prosecution in the being for a civil suit. The object is to recover damages for expenses - and not for injury to reputation. In Connt the damages are trebled by Stat. There are very few cases in which this action will lie. There are three sets of cases in which this action may be brought. The 1st is Where a man sues another in a Court incompetent to the defence. 2nd Where a man having a suit in another known & perfectly made that he cannot recover. The 3rd of the action is that the object of the suit was to vex, and opite the Plff. A man may conscientiously Cro Eliz 132 1 Saund: 226 1 Vent 12 Lev 62 206 4 Co: 14- think that he has no right to recover yet he may suppose the law to be with him. This cannot be ground of an action for vexatious law suit. The third set is where there is a demand but the suit may be so conducted as that the Plff may be liable to an action for vexatious lawsuit. As when A owes 50 ℔ to B. and B sues him for 1000 ℔. Where there were two merchts of great respectability lie dying in Connt and one 1 Ld Raym 114 Lev 62 of them had also arrested in the public street in N. York for 100 ℔. The Judge thinks that this was also a vexatious law suit. although it falls within neither of the above set of cases It was says the Judge making use of the law to reach a mans estate.

Private Wrongs. Assault.

More trouble and vexation of mind never are ground of damage in this suit. The damages in these cases are generally liberal. The Statute in this State besides subjecting to treble damages subjects to a fine which is recovered in the same action.

Trespass vi et armis.

I shall here consider only injuries done to a mans person and his personal property vi et armis. 1st as to injuries to a mans person. In trespass all are equally liable. they are all who countenance the thing are equally trespassers. The Pltff may sue all or any of them. or one of them if he pleases. So the Execution may be issued upon all or only upon one. The fact if you sue and cannot get your money you can never sue another. Not so in Contracts for there is a certain sum of money due to you. But where the damages are uncertain, this cannot be so.

The first injury to a mans person which the law notices is assault. If a man threatens so to strike you as to endanger your corporal hurt. if you may recover in this case principally for the insult. and the sum of damages will depend much upon the circumstances attending it. Now if a man by plain & evident signs & tokens shows an intention to do you a corporal hurt. & has a present ability to do it. this is an assault. 1 Hawk. P.C. 134

by plain & evident signs & tokens shows an intention to do you a corporal hurt. & has a present ability to do it. this is an assault. 1 Hawk. P.C. 134

actually offers an indignity. the explanation amounts to nothing. the mere fear of bodily hurt is not much to be regarded. No words however provoking will entitle to this action without a threatening posture.

Elementary writers say that an assault must be accompanied with such menaces & acts or words & actions as to put in fear a man of ordinary nerve. The Judge does not go the whole length of that rule. The Judge thinks all the circumstances of the case ought to come before the Court with the peculiar situation of the parties.

Battery includes an assault. Thus not an attempt to commit violence but an actual commitment of violence. Where the injury is merely accidental then the person lies. where there is negligence on the part of the fellow or where he was engaged in an unlawful business. Thus if A goes into B's lot to shoot his horse, but misses the horse and hits B in a neighbouring lot. this is a battery. and it would be liable. because he was unlawfully engaged. Thus too where a man's axe is in the habit of flying off and he accidently wounds a man standing near him. the fellow is liable on the ground of negligence. The care used must be such as ordinarily is used by men. by men in common.

The rule is laid down that constitute an action of trespass vi et armis must be immediate and not consequential. which must by trespass on the case. Thus where A strikes B's horse and he runs over C. C says the Judge may maintain the trespass vi et armis vs A. The Igumbo case is a leading case on this subject. where the Court considered the continuation of the action as one.

Private Wrongs. Battery.-

Judge Blackstone was opposed to this rule. Uncertainty is not necessary says. that Judge that where the stone is rolled into a crowd that the stone should hit the person intended, to maintain the action. Where the parties are playing together or where they are exposed to hazard, the action cannot be sustained.---- as where one is hurt in wrestling- There are two cases in the Books which appear to be the same, but the difference lies in the Case. The same rule above laid down governs in all the cases. If a man riding a horse not ungovernable should by accident run over another, he would liable. Secus where the was ungovernable on the ground of negligence. There must be common prudence in all these cases- cases of recreation such as wrestling and fencing will not come under these rules. But if foul play is used. the rule is otherwise.- 13 Ch. 2 16. Esp. Ch. 2

There is a subject upon which the judges and gentleman of the Bar differ. which is this where two men agree to fought over a string, whether the action will lie. There are cases which say it will not for the thing was unlawful. But the Judge thinks that it is good for they that if two men agree to break the laws. they should be punished. and that the case is analogous to that of Contracts and that there should be no recovery. In a civil suit the Judge thinks he should not by any means recover. The judge thinks that if the Jury can whittle down the damages to a cent. they may as well whittle it all away. but the law is otherwise- 2 Lev: 174

Private Wrongs.

False Imprisonment

False Imprisonment.

This includes both an assault and a battery. Every restraint of a persons liberty of locomotion is an imprisonment. and if this restraint is without authority it is unlawfull. When there is a person imprisoned by a judgment passed by a person acting under lawfull authority it is not false imprisonment. the Judge is not liable at all. unless there is malice in the case. The man must have authority over the subject matter submitted to him. To discharge his liability The officer is bound to execute every process issued to him unless it appears on the face of it to be issued by incompetent authority. If the arrest be illegal. the officer may or may not be liable as the case may be. If he can see it on the face of the process he is liable as he is not. If the illegality arises from some thing dehors the writ. the officer is not liable. 2 Wm 10 Co: 76 Ld Kay 229 the Marshalsea case. where the Judge thinks he was

A person acting over a subject not within his jurisdiction. is no more protected than any person else. The officer in the case in Strange was held liable because he plead not guilty. If he had justified the case would have been different. ..... If a man will keep bad company on his plea he must abide the consequence.

2 Str. 993 Atkinson v Smith 2 Mod 195

I shall now point out some cases where the arrest would be unlawful. and of consequence lawful imprisonment and first arrest on Sunday. This is void by Stat. 29 Car. 2 Com Law all judiciary acts were void on Sunday

Hob. 202

but ministerial ones were not. An arrest on a false
would be false imprisonment. This law does not
extend to cases of felony and breaches of the peace
where the public are concerned. The 3d act is one of
29 Ch. 2nd. which is copied in nearly in all the
cases. If a man has been arrested on a Week day
and escapes the Bff may retake him on Sunday.
he does not take him by force of any process but
because he is his prisoner. The same is the case
with bail. and the Bail piece is mere evidence
of his being the prisoners prisoner and of course
is as extensive as the Pledge as the Arrest.
Suppose a person is arrested by civil process on
Sunday and is arrested on Monday being in the
custody of the officer. The question is whether the
arrest on Monday would be lawful? This has been
decided both ways. It is laid down in the elementary
writers that if an Officer breaks open a door and
arrests the arrest is lawful. The case of Case in Coke
is always resorted to. The Judge thinks that no process
in violation of law is lawful. and in the case
above supposed there is such a violation. As in
the case of breaking a door. the law considers a mans
house as his castle. and it is not to be violated.
A man had hired a room in a public building having
an outer door which was always open. and the
officer broke open his door of the room. He applied to
to the Court for relief. The Court went to show that there
was an inner door. Then the Court found it to be an

Com. Dig. Page 280
Bac. Ab. False Imp. B
9 Co. 66

1 Salk 785
1 Mod 95

5 Co. 93. 92

Com. Dig. Ist

Son assault desmesne

5 Mod 95
Comyns 6
Burns Justice 100
1 Atk: 153.
2 Blackst 820
2 Burr: 1074

an outer door they would have discharged. There are cases however in which this punishment cannot be enforced. There are many cases which bear upon this question.

The lefts justifying - pleading.

There are cases in which a man may justify, he must plead specially upon the Record. In Court they plead the general issue and give justification in evidence. Where a man is going to hurt you or knock you down, you may be at him - and you will be justified. The arrest of persons supposed to have been guilty of a crime - where the circumstances are against the felons - may be justified. But there must be no wantonness in the case. If an officer is sued for an assault merely, he may bring in his warrant and that is sufficient. But

1 Wants 130

if the declaration charges him with wounding the Plff. he must state the resistance - and the necessity of force. The officer must use just so much force as is necessary to keep his prisoner quiet.

Son assault desmesne.

This is a justification on the footing of self defence. It is not necessary that the man should strike you - you must use just so much as to defend yourself - but if you overstep, that a little, the law will not be so severe to you. But you cannot use excessive violence in any case - and to draw the line is not a little perplexing. This right of justification extends to a man's wife, child, master, father, mother - as to question whether the Master can justify in defence of his servt. there is some doubt. The man

1 Salk 646
1 Sid 246

can justify for no more than the man appeared
can do. There is another defence called molliter
manus impositus. this is where a man wishes to enter your
house and you keep him out and plead this in jus- 1 Sid. 62
tification. A man may defend his property and 1 Salk 64
justify an assault by se molliter manus impos-
uit. — Evidence may be admitted very often that does not
go to justify but to mitigate — as provocation of
a gross nature. Words are never a justification but
the same time it will suffer their abuse to be given
in evidence. But their abuse will be no mitigation
of damages if the battery appears to have been in
revenge of the abuse as at a subsequent period.
A man can pay regard to passions excited on the occasion.
but must not indulge revenge —

Mayhem as distinguished from battery
is the deprivation of a member in use of fighting
It is very little thought of now a days —

A recovery is a perpetual bar to another
action of trespass vi et armis for the same
cause. No subsequent damage can be sued for. 1 Salk 11
There would be no end to law suits were such a
rule. says the Judge. Where a number of persons
are sued in trespass vi et armis. the damages
cannot be severed. There must be a recovery or
all. The principle is this whoever aids or abets
becomes a trespasser. and becomes liable for the
whole. When the verdict is given he may have exe-
cution upon either. and if the Sheriff sues one and

recovers damages commensurate to the injury, the verdict is a bar to an action vs the others.... If a number be sued they may plead seperately and make as many different pleas as they please. In this case there must be different trials - so one may join issue and another may demur to the declaration. But after all judgment goes vs all and execution follows of course - and is for one sum. This preserves the law entire. But the demurrer is sustained and the Plff joins the other guilty, execution can never issue because the Decln is found bad. The Plff may levy his execution upon any one, or of all of them.

Cro Jac 350 11 Co Rep 61 Stra 1267 But N. 320 Earth 19.

If the Plff do demur and the Plff does not set aside the verdict he must content with the largest sum vs all. But the verdict is bad if the Plff chooses to make it so. This principle is preserved entire, in all circumstances as where one of the Defts makes default and 500£ is found vs the other, execution goes vs both. The time is immaterial, except that it must not be without the Stat of limitations. But if within that time of lim one time is good as another. The claim en lost cannot be revived by a promise after the Stat of lim had run upon it. If the Deft is found guilty in a public prosecution the verdict cannot be given in evidence in the subsequent civil suit.

Writ of Replevin.

This is an action of trespass vi et armis as to property. It is different in its construction from all other writs, and has a two fold object to recover damages if the bailment be wrongful, and to recover

back the property. The word signifies the substitution of one pledge for another. It exists at Com. law only in two cases. which are, where property has been distrained by landlord for Rent and where Cattle are impounded for doing damage. This writ was invented to protect the Tenants from their landlords. He must get some one to give a Bond to try the right of distreining, or the amount. The cattle are then delivered to the Tenant. The writ of Replevin goes up to the Court and is there tried. If nothing is found due the landlord is a Trespasser and damages are recovered from him. It answers both the Plff and Deft as the circumstances of the case require. This writ of Replevin for a Distress is not much used in the States. Another case where this writ is brought by the Com. law. is when cattle are found damage feasant. They may be impounded as a pledge. They may be taken out of the Pound by this writ on Condition of the owners giving a Bond to pay the damages. If the cattle were found on the highway and were impounded. the person would be a Trespasser and damages would be recovered on this writ as in an action of Trespass. There is another use made of this writ where property is attached to satisfy a judgment. This property then attached they may by replevin. and the object is the same as in the former cases. This is practised in Connecticut. The Statute purposes. under the stat of Const. that the Garnishee in a foreign attachment might replevy.

Where cattle break or pass the highway. If the cattle are commonable, allowed to go on the highway there would be no right to impound them. Places where the cattle are not commonable. With respect to fowles to turkies and Geese the law has made no provision they have generally been treated as animales of fera natura. If they are taken that they may be kept. There is in this provision sometimes some difficulty as to the Jurisdiction. Because the debt in the Replevin may claim such a sum as cannot be tried by an inferior jurisdiction. The Judge thinks the proper course to be for the Justice to go into an enquiry concerning the damages. and if he finds the damages are such as that he cannot pass judgment he must dismiss the cause. In those States where they have an attachment they take out the Replevin not on the grounds of any Trespass. When in this case a Bond is given the Judge thinks the penalty ought not to be recovered. but only the amount of the execution with Interest. The Judge thinks this is exactly analogous to the Case of a Bail bond. where the penalty is never forfeited.

If a Sheriff levys upon the wrong mans property he is liable. But Replevin it is otherwise. If in this case there is a mistake made it is not the officers but the Court. The Replevin is given to no person but the Sheriff. When an officer intending to attach B's property but alledges by mistake B's. C cannot replevy but he must bring Trespass. Replevin is never given

to any person but him as whom the claim is. —
In Const it was the Custom for the person whose goods were attached to give his own Bond and thus get the property into his own hands. The Ct of Errors however at length determined the Bond to be void. — Root. Bidwell

Trover.

This lies only for personal property. It is brought to recover damages and not the thing itself. Whoever one has converted the property to another to his use that the action is brought. It is no matter how he came to the property. The Declaration always states that he came by the property by finding — which is a technical term —
This action may be brought in three cases of cases the 1st where the man came wrongfully in possession of the goods. The 2nd Where the bailee has the goods rightfully, but exercises the right of ownership. The third case is where he came to the property rightfully, but will not give it up. This furnishes sufficient evidence of a conversion. In the first case the tortious taking is a Conversion In the second case there must be a demand and a refusal is sufficient evidence of conversion. but not conclusive. If a substantial reason can be given for the refusal it is good evidence to rebut a conversion. Where the goods are lawfully taken there need be no demand. This action is confined to personal property merely, as a where trees are cut down & Trover cannot be maintained Bull. N. P. Roscoe Ev.

This action is always concurrent with Trespass vi et armis when there is a tortious taking. So where goods are fraudulently obtained. Trespass vi et armis will lie - for the fraud destroys the contract. This is the operation of fraud it always destroys all Contracts and leaves the party in the same situation as if it had been done with violence. Here Trover is concurrent. In order to make Trover lie there must be some amotion of the property. Where a Tavern keeper brought Trover for cutting down his sign. It was held the action would not lie because there had been no amotion of the sign.

The Plff states in his Declr that he has a property in the thing and his possession which is always a constructive. He states that the Deft came into the possession of it by pretence and that he converted to his own use. A demand and a refusal are only evidence of conversion and need not be stated. The conversion may be proved in the three ways already stated. Where he came by it rightfully you must prove existence of ownership and in the last case you must prove demand and refusal. ~~The personal property whosoever holds property~~ A judgment in favour of the Plff vests the property in the Deft and where the property has been transferred to a third person. the Deft cannot sue the third person for his contract is in the way. The Plff might have sued the third person in

the first case because it is the nature of the action that it can be brought vs any one who has the property. the third person in that case has his remedy over agt this seller. When the property has been returned to the owner, there will be no recovery only for the taking. The general property, and the Special property men may bring the action. If one brings the action as the Special property man, the other cannot, but will be barred. His right of recovery is his liability to account to the general property man. This is the principle which is the foundation of his action. If the general property man brings his action first, he carries all right vs the Special property man. who only recovers his own special damages

B. & P. Eastn.

It is not on the ground that the Bailee is eventually liable to the Bailor that he is allowed to sue: but it is because he is liable at any rate to account. If he recovers the full value he must pay it over to the Bailor. It is for him that he recovers it. But suppose the Bailees possession is instituted by the Bailor before the time of Bailment has expired can the Bailee maintain Trover? The rule is that neither Trover nor Trespass will lie. but that the action must be case. The reason of this rule I do not know. If property, trovered from hand to hand by transfer the owner may maintain Trover agt any person who has it. The purchaser complains of this for he says he has found his money for it. But the maxim is qui prior est in tempore potior est in jure. But if a man has been gulled out of his property by fraud and the person transfers it. the owner cannot sue the third person in Trover for it. The maxim just mentioned does not apply here. And the reason is that the owner by suffering himself to be defrauded has aided the purchaser to practise an imposition

Private Wrongs. Trover -

on or thro person - ets e. g. where A purchases goods of B with counterfeit money knowing it to be counterfeit. If A sells them to C. B cannot sue C in Trover. But had A stolen the goods and sold them the case would have been different. A Question has been raised whether Trover lies for money. If the money be in a Bag so that it can be identified Trover will lie as well as for any thing else. But money can never be followed after it has passed out of the hands of the Trover. This rule is founded on public policy. For it different all Commerce would be destroyed. This rule is applicable to every thing which is a Currency as Bank bills. Bills of Exchange. It ought no one or two or more joint Trovers is a bar to an action vs another.

In some cases the property trovered has by a Rule of Ct been allowed in Evidence to be brot into Court. This has been the case where the articles were peculiarly valuable but not bulky. There never known a rule of Court here to bring in collateral articles. It is a good deal seen in the Books that no plea is allowed in Trover but the general issue except a Release. I never knew the occasion of this rule. We have never adopted it. When the property is owned jointly or in common Trover will not lie by one owner against another. Suppose then that A and B owned a horse jointly and A got possession and rode him all the time B sat C.L. has no remedy. There was however a Statute which has been copied in most of the States giving an action of Debt to recover half the value or half the profits where one of the owners converted the property to his own seperate use. But to the C.L. there was one exception where one joint owner entirely destroyed the property & this has since been extended to sales that the other might maintain Trover. When the property of joint owners is trovered they must join in the suit. But if they do not it can be taken advantage of only in abatement. There was a question formerly much agitated but now settled. If part of the property is taken away and the rest is injured by adding something else, will Trover lie for the whole. As if 10 Gallons were taken from a Hogshd of Rum even as much water put in. There was no doubt but Trover would lie for that taken away even case for the injury to the Remainder. But it is now settled that Trover lies for the whole. There a Rule in the English Books that if the Servt by the command of his master the master only can be sued in Trover. This is on the ground that there is no conversion by the Servt

Private Wrongs. Trespass vi et armes.

to his own use. Q. whether it may not be considered a Conversion by the Lent before it comes into possession of the master. See B. & S. there is a great case respecting this rule. If the property of an unmarried woman is taken before marriage and converted afterwards who must sue for it. As the property of the woman is transferred by marriage to the husband he may undoubtedly sue alone. But may he join his wife as this action would not survive to her upon abstract principle he could not. But wherever the wife or her property is the meritorious cause of the action the husband may join her in the suit. He may therefore in this case. Trespass vi et armis as to personal property. This action lies in all cases where the Plffs property has been taken without his consent. It is generally concurrent with Trover. But when the property is destroyed without motion this is the only action. Whoever has possession may have trespass. The Bailee then may. But the possession must be by contract either express or implied so as to render him liable to account on this subject the law is the same as in Trover. The possession must be lawfully gained. If A then steals goods and B steals them from him A cannot maintain Trespass against B. But if one of two persons has possession when there is a dispute about the title he may maintain Trespass if deprived of possession. If a man is in possession of your property with your consent and refuses to deliver it on demand Trover is the proper action as not Trespass. Wherever a license given by law is abused Trespass will lie. If A goes into a Tavern and calls for a Bottle of wine and when he has drank it breaks the bottle and refuses to pay he is liable in Trespass. for the law presumes that to have been his intention when he entered the house. But a mere non-feasance will not support Trespass. thus in the Case just mentioned the man should refuse to pay his Bill. But to this rule it is said there is one exception. e.g. if he has a warrant vs B and arrests him & neglects to return the writ. Trespass he lies against the officer. But Perhaps then it is not for non-feasance in neglecting to return the writ. It lies for the arrest itself. For the Plff can justify the arrest only by his warrant and thus he can never show until it has been returned. The Sheriff is therefore guilty of a misfeasance. For a mere breach of Trust Trespass will not lie. The action must be

2 Roll. 257

3 Bulst. 66 Holt 6

2 Roll 561

Where a special authority is given by Statute that authority must be strictly pursued. e.g. by the Stat authorising the impounding of cattle taken damage feasant requires that early to give notice to the owner. If he does not do it he is a Trespasser. Suppose the owner actually has notice, But not from the distrainer. This will not excuse a want of notice from him.

1 Mod 241

2 Wolle 565

Private Wrongs – Trespass & Arms

There have been many cases where it has been held that Trespass would lie where none, now I think to be considered law. They proceed on the ground that no one had a right to intermeddle with the property of another without permission even when it was an act of charity, e.g. – a looking glass broke in moving from one house on fire & Cattle's leg broken in getting it out of a ditch. It might as well be said that assault and battery would lie for helping a drunken man out the street of his leg was broken. But this not so.

Never I have observed this against the Vendee of a Fortiori taken. But Trespass will not for the purchaser never invaded the possession of the owner.

There is one case which has made considerable figure. Suppose a Sheriff having arrested a Man in a bailable case refuse to take bail when sufficient Bail is offered what must be the form of action. Some say Trespass & some Case. The arguments on both sides are equal. If the refusal to take bail is a mere non-feasance then Case is the proper action. But every act after his refusal to take bail is a misfeasance then Trespass will lie. This is the running point in all the cases. We have in this Title distinguished trespass & subsequent consequential damages whether they proceed from a lawful or unlawful act Trespass will not lie. There is no remedy for damages from a lawful act whether Trespass or Case

Connecticut

For case vide Bro: Case 196 & all the cases there cited

As to damages immediate and consequential. I shall consider them more at large under Trespass on the Case. A man may build a dam on his own land. but shall not so stop the water as to overflow his neighbours. Sic utere tuo ut alienum non laedas. The damages here are consequential. The action is not Trespass vi et armis. but on the Case. The act here is lawful. but the result is injurious to another. and the damnes is liable for damages. An action of Trespass will not lie when the taking of the property amounts to a theft. The Judge thinks this is not law here. because the reason of the law does not exist in this Country viz the forfeiture of the goods and chattels of the thief. The Judge thinks the action certainly would lie. A man is not only guilty of Tresp. for that he himself does but from other quarters as by his cattle he is charged with the Tresp. A man may say the Judge may have either of these three remedies for he finds cattle in his field viz impound them. an action of tresp. or he may take them. If he sets his dogs upon them the law presumes they went not when they came in. and if they are lost. he is not liable. If the cattle are torn to pieces. he is liable for the injury. Small dogs may be set upon them. if they are hurt the Judge seems to think he that he would not be answerable. because it is not to be disposed that he would hurt.

Hut 60 4 2 Co Rep 1 May 1599

2 Roll 555

2 Roll. 555 4 Co: 38

Trespass on the Case.

I shall here only consider those cases where the action answers or debts of those Wrongs are two Kinds 1st Where the injury is not accompanied by force. The 2nd Where the damages are consequential from some act accompanied by force. And the third for some culpable omission. Under the first head come Slander &c. under the second head as where a man sues for beating his Servt. the loss of service being the gist of the action. Under the third class would be damage resulting from the omission of duty of a person you may employ. These actions are all founded on the equity of the Statute West 2nd. From this Statute arises more Law than from all other Statutes put together. The Reason therefor that no action was brought against the Sheriff for an escape till after this Statute though elementary writers say differently. He was liable indeed criminaliter always. By Statute Richard 1st the action of debt was given vs the Sheriff for an escape from one Gaol & the Courts extended it to all Gaols. In old times for every action of Trespass vi et armis there was a fine to the King and for an action on the case there was an amercement to the Deft. It became therefore necessary to draw the line of distinction. Courts have now dispensed with both. The Gist now is the same as formerly as consistant. All acts accompanied by force are the injury is immediate are the subjects of Trespass vi et armis. when the

2 Ray 1349
Bop Dig 518
B. C. 153.
2 Wils

3 B. 3205
3 Reeve Hist
E. L 245. 394

6 H. 125
2 Mod 34
4 Bac 196
4 Inst 11
2 Blac 506

3 B. C. 206
1 T. R. 467
2 Bla. Rep 892
3 T. R. 231
4 Inst. 684
2 W. Bla 1035

injury is consequential then are the subjects of trespass on the Case. There is sometimes a great deal of difficulty to tell under which the injury comes. One thing is certain, that to constitute immediate it need not be the instantaneous effect of the force. If there is the intervention of no other cause or agent the person who gave the first impulse is liable in Trespass vi et armis. Where there is an intervening voluntary agent the person would be liable in an action on the Case. Lofft says the Judge a man chose to let loose a mad Bull into a crowd for any injury he would be liable in Trespass vi et armis. But when he digs a ditch and an injury is received action on the Case. When a man rode his horse into Lincolns Innis fields and his horse ran away and a hurt a person. Action on the Case was brought and supported. It has been held by Judges that there is no difference between this and the Bull case and that action of trespass vi et armis ought to have been brought. The only difference is that the man had no act was employed in riding the horse there but he had no idea that any evil consequence would result. If a servt does an injury without any command of the master. the latter is not liable in Trespass vi et armis for this mere act does not concur in the act. But when the injury is done not within the pursuit of his masters business the master is not liable at all. For every injury done by the servt. where the will does not concur the

Dicks Cro Jac 646. Cro E: 10 Esp Dig: 599 Lyons Case. Vide Case Pitts & Bl & Pet.

2 Vids: 174 1 Stra 638

1 Vents 295

East- is on the case. The same rule holds with respect to master and dogs. If the master knows that the dog will bite, he is liable. But where a man is called 8 T.R. 185 1 Bur 2093 6 Burrow 2425 1 Salk 44 2 Show 1083 get into a man field how is it that the action of Trespass vi et armis is brought and not on the Dog's case. The will here does not here concur with the act. There is no reason but the Privilege therein it an exception to the rule and that upon principle it should be Trespass on the Case.

I shall now point out a few variety of cases in which this action lies. But it will be impossible to point them all out. For since this action was established the maxim almost entirely true that for every injury there is a remedy. This action will lie for all injuries from a criminal neglect of a duty which a man ought to do. But in this case the duty must be established by law. Does or does not the case impose upon the bender of goods to keep them with due diligence on this subject there is a difference of opinion. If it does and he loses them he is liable. and if it does not, it is secus. The authorities are contradictory. There is obviously no duty arising from any Contract. yet the mere receipt from the owner that he should restore 2 Ray 917. 6 Mod: 214- no care upon them at all. The Privilege is at at loss to find out whether there is really any duty imposed upon the bender so as to subject him to an action. one thing is certain. that in an action brought for not keeping safe out of a Bundle of Cloaths. Which had been found. he was 1 Com 206 held liable. Once determine whether there is a duty or 1 Roll 93 not and the solution is easy. For wherever there is a 1 Blac 566 1 Salk 282

duty he is liable for a neglect of that duty. So on this ground that a Sheriff is liable for a neglect of his duty. Sheriffs are always answerable for the acts official of their deputy. But they are never liable for their criminalities. The case in Doug: subjects the Sheriff to the same liability for the acts of his deputy as a master is for his servants acts. There has a Case been decided on the same principle in the Court of Exchequer. The rule is universal that where a man does business for another in the line of his business he is liable. Thus in Engd when you employ a man to do business for you ever you have the means of knowledge that he is a mere impostor you cannot recover. This goes on the ground of policy that such men ought not to be encouraged in their impositions. But every man is liable on his express contracts. Every physician may make mistakes and there cannot be the cases for which he is liable. The judge says that as far as he has examined the rule is this. That if Gentlemen of profession are called to testify that the thing could not have happened without negligence or want of skill the fellow is liable. If a man neglects his patient there he is certainly liable. In Surgery. It has been determined that a Surgeon has been made liable for making experiments in setting bones. They considered under the head of negligence. Where a person sells knowingly articles of profession or nuisance which injure the health of citizens he is certainly answerable for any damage sufficient to prove the fact to subject him to

Doug 477

2 Ray 214
2 Bels 359
Esp 601

Esp 601
2 Bels 359
3 B. & C. 127
166

damages without proving special dam: The Judge charges that if a man sells unwholesome provisions not knowing it he is liable on the implied contract that they are good. but not for any fraud. Where any man sells moonshine he must answer for it on the ground that there was a contract that it was sunshine. but not for negligence. There is very often some confusion about the action of Warranty. They tell you that an action for deceit will lie. But that is not always proved. It is laid in the books that in the case of noxious animals scienter is not traversable. and yet scienter is necessary. If the injury is done by a man as fera natura there is no necessity to take notice of scienter.

This action lies as an officer for an escape on mesne or final process. This action was first given by 1st Richd 1st. and was extended by the 1st West 2 where there is a new action given by a statute and there is an old remedy. the rule of damages is the same in the new as the old. In the second JR. the Court say that in action for an escape that the jury may give what damages they please. which exceed. Where the bailiff arrests a man on a void process. and suffers him to escape he is not liable. if on erroneous process. for that is good tho it is not made.

Trespass on the case is the action to be brought by the person who is injured by hearing a man rescued from the Sheriff. The Bailiff remedy vested Trespass or to misprision. Case. this action lies on mesne or final process

9 Rdc: 166
1 Roll 95
1 Roll 90
2 Cok. 52
Com Dig 166
170 —

Ast. Dig 606
6 Mod. 350
1 Com Dig 206
1 Salk 66c
1 Lo Ray 109

1 Com D: 208
4 Co: 18.
1 Role: 21.
12 Ray 606
Cro Car 284

2 Hale 126.

2 Bac A. 45
1 Atkins 175
Cro E: 17.
2 Black 879

1 Coke 146
2 Mod 31
Cro Car 141.
" 194
2 Rols: 313.

Case

In a rescue on mesne process there the Sheriff can return the rescuers and arrest & retake them. Rescues on penal process there he can make no such return. This is founded on policy. In an action for a Rescue by the Sheriff the Jury give what damages they please. sometimes the whole sum. and sometimes more as smart money. There has been a question whether the Sheriff could sue the rescuers. some say he cannot. If he can his remedy must be Trespass vi et armis. on the ground that they have taken away that from him which he had a right to keep in custody. If the Jury give the whole damages it is a satisfaction. Where the Deft is insolvent and not worth a cent. there can be a recovery for the whole amount as the Sheriff. The body is as good as the money in contemplation of money. But if the Deft is solvent and can be had. it is good reason for mitigation of damages. Trespass on the Case is the remedy by the party. If the rescue be on penal process there is no doubt but that either the Sheriff or party may maintain the action. and recover the whole damages. The Sheriff may protect an escape by an act of God or the open enemies of the land. If the Sheriff on penal process brings his action vs the Rescuers he waives his remedy vs the Sheriff. The Sheriff need not wait to bring his action vs the rescuers. tale he has been sued. If the party pursues the escapee he waives his remedy vs the Sheriff. There are cases where the Sheriff may sue the escapee. But this does not extend to a voluntary escape. The party can indict. If the Deputy Sheriff suffers an escape any way

Bac. Ab. Sheriff (K) 2.
6 Mod 211
Root 180
1 Salk. 331

Bac. Ab. Sheriff (K) 6.

6 Co. 53.
Bro. Ab. 613.

Esp: 613- he is answerable to the high Sheriff - and has his remedy vs the escapee. The Defndt cannot bring the action in his own name for he is not known to the law. But the Judge cannot see how the Deft Sheriff can bring his action vs the escapee in the high Sheriff's name when the high Sheriff has sued the Defndt himself -

Esp: 399
Esp: 613.

Liability of Attorneys in this action

They are liable to their clients for their neglect &c. mismanagement. I mean by their wrong conduct and not mistaken conduct. When an attorney had endeavoured to corrupt the Jury. but found. but they did found a verdict for his client. the attorney was held liable to his client for the expense he had been put to in trying the same thing over again. It is a rule always to set aside the verdict when there has been the least tampering with the Jury. They are not liable for want of skill in their profession. An attorney may make himself liable to the opposite party for his conduct.

1 Burr 260
1 Salk 86
Esp. Dig 612
1 Bls: 325

Bullon 225
1 Bls 377-

This action will lie vs any ministerial officer. When Justices of the peace they are sued they are sued as Ministerial & not as judicial officers - They are never liable in their judicial capacity, if the subject matter is within their jurisdiction. The Justice has no right to refuse to sign a warrant for it is ex debito justitiae. But where the law gives him discretion it is otherwise. as the Judge need not grant

Private Wrongs - case

1 Barn & A. 90

an audita querela. after hearing the matter of the
Charter it ought not to be granted -

This action lies for all cases of breach of trust in a Bail 2 D Ray 909
ee. for want of proper care. - There is a certain kind of 6 Co Litt 89 -
Bailees who are liable at all events as Common Carriers. 2 Co: 83 - 618
There has been a question whether all these cases 1 Salk 26.
are founded on Contract. But they are generally con-
sidered as ex delicto and the form of action shows Esp. 623 -
them to be so. These actions are brought as any mem- 1 Salk 440
ber of the owners. 5 B. 7 C 651

I have forgotten to mention to you the case of Post- 1 Selk 17
masters. It is said they are peculiar exceptions to the gen- 6 Com. 754
eral rule. There are but two cases on this subject -
the last decided by Lord Mansfield. The Judge
in this case that were there nothing else the necessity Est. 624
of the thing is sufficient to establish the correctness
of the decision that they are not liable. - Besides they
are not employed by the Post master Gen. as other 3 Wils 443.
Servts are generally employed. - He acts as a mere agent
of the Government.

This is the action which is brought as Innkeepers for a loss
of property, &c. They are liable at all events on a principle
of policy. for they may collude &c The only enquiry is whether 1 Com. Bail 183
the property is lost and not whether he has or has not 2 Co. 82
ordinary care. The person to be entitled to this action B. & P. 378
must be a Guest. a mere boarder is not within this term. 5 B. & R. 273
If the property was lost or by the Guests servt. the Inn- Moor: 98
-er is not liable. so if it is by his Guest fellow traveller 6 Co: 62 a

Case

Bro Pas: 188

The Innkeeper is not liable unless he receives some profit from the Guest. he is not liable as a mere depositary. If a person not a Guest leaves goods and goes off the Innkeeper is not liable for loss as such. But if he receives profit as for a horse he is liable. The Innkeeper may have an excuse as that his is full. but at the entreaty of the Guest he receives him. he may excuse himself. But he must take persons who apply to be accomodated or else he must will be liable in this action. But he may be excused by the sickness of his family or that as above his house was full. in Bro 8: 622 it is said that sickness is no excuse.

1 Salk 388
Bro Pas 189
Bol: 628

2 Show 327.
3 Bl. Com 166
1. Bol Rep 87
12 H. 90.

Bro 8: 622
Bol 628. 9
& Bo: 33.

This action lies in cases of deceit in sale of property. Where there is a warranty this action is brought. But where the defect is plainly visible it is said that this action will not lie. But the reason of Haurty is really founded on Contract and where there is an express Contract the action should always be brought on the Contract. But the cases where this action is usually brought is when there is an false affirmation. where there is no visible defect. But the case is this. if the false affirmation is an affair of opinion the Plaintiff cannot the action will not lie. Secus where there is an false affirmation of fact. Where the defect is plain. the seller would not be liable. The maxim Caveat emptor applies here. Secus when the sale is to a blind man. Sometimes it depends upon the form of expression as where the seller says L.S. would give me or $.00 for this horse. this is a matter of opinion. But if L.S. is present. there the Buyer ought to enquire of Mr L.S. Circumstances alter cases, in law as in other things.

Salk 211
Bro Pas: 4
2 Show: 20.
1 Roll: 99.

2 Roll Rep 188
1 Ford. 110
3 Bl. C: 165

Where a man sold a horse knowing it to be unsound and said he would do as much service as if he had it not. one case says he would and another not. The Judge thinks this a matter of opinion and that no action would lie. the case in Salk. where a horse was sold having but one eye. The concealment of the fact is as much a fraud as telling a false hood. A concealment of what in good conscience ought to be told and a discovery of what would have altered the contract if not disclosed it is a fraud. Elementary writers lay down a rule which the authorities do not warrant. They say if a man sells property and falsely affirms with out scienter this action would not lie. A man has no sum of interest in the thing sold in the thing. the Judge thinks this action may be brought. tho it is said to the contrary. Justice Grose said he would not be liable. This decision has been somewhat grumbled at since.

This is the action brought for cheating by false pretenses or for dealing with false cards. &c &c. This action is brought where a man has a public right violated. So this action is brought where a man is not allowed to vote. The Inspectors however act in a judicial capacity and then may sometimes be some difficulty. Where a false return is made the Candidate has the right to bring this action. Cases in Eng^d have said that the Candidate could not bring this action parliament being the proper tribunal to try such matters. This decision has however been overruled. So that is the action brought against any officer or Corporation for making a false return to a Mandamus issued by the Supreme action. So at Com. law this would be the action for substituting a

3 Bla. 165 6

Salk. 211

2 Roll. R.
3 Bla. 165 6
Bac. Big 63 e

2 Kan. 240.
Esp. Dig 474.
1 Show. 68
1 Salk. 210.
Carth. 90

3 T.R. 51.

1 Dev. 240
B. & P. 832
Bac. 6. 140
Bac. 633.

1 Salk. 19.
3 Salk. 17.
Esp. Dig 647

Salk. 502.

6 Mod. 45-29
1 Nelson 122
Esp. Dig 647
St. P. 62

Trover & Trangs — Crim. Con.

an others work. The Judge charges that there was gen-
ally no such opinion entertained as that a man had
literary property after he had sewn his work to the word
at first there were injunctions issued from time to
time the printing of such books. The Statute of Anne was
the first that was passed on this subject which
prohibited in those days as our statutes now. The action is
now brought for a violation of the Statute. A publishment
of abridgements defeats the purpose of the Statute for it
deprives the proprietor of the whole benefit of the sale
of his book.

4 Burr: 2303 or thereabouts

With respect to officers who are to serve process. If they
are violently assaulted or resisted trespass vi et armis
is the proper. But if the sheriff is after Tom Stokes and he
goes into T.S. house and S.S. locks his door and refuses
entrance to the sheriff then action does in favour of the
sheriff vs T. Stokes.

Bro C: 908
5 Geo: R: 93

The next action whose name is Crim. Con. which is an action
on the case. Somehow or other it has been ranked among
the actions of trespass vi et armis. The only ground to
support this says the Judge is the legal maxim that a
man and his wife are one. The damages to the husband
are surely consequential. And if it was force and arms
to her. It would be a trespass. It is brought to recover
damages which are generally pretty great. Particularly if she has been of good character. In evidence
this action the evidence is introduced to mitigate
the damages. Formerly it was held that even tho.
the husband connived at it. he might support this
action. It is now otherwise. In this action there must
be an existing marriage proved as alleged by the

Private Wrongs. Mandamus

Register or by persons present at the marriage.

Mandamus.

This is in the nature of a specific remedy. It is not for money, but to have something done. It issues from the Supreme Court of the State. The object is to invest a person with or to restore him to a right which he has deprived of. It always relates to some corporation or some officers of the public. As where a Clerk of a Court refuses to issue an execution, a Mandamus will lie. There may be an action as herein ended but it may not be an adequate remedy. So it lies too where an atty is thrown over the Bar. as remedy. Also in cases of Money where no suit will lie. a Mandamus will issue. as where the Treasurer of the County refuses to pay a debt to a man. A County is not a corporation. A States Atty cannot be sued in such case. Where a man is entitled to an office and is excluded from it. then Mandamus will lie. So too where a County Court refuses to accept a judgment. The man must be an officer as a Clerk of a Court. It lies to compel the performance of an official duty. This writ is as much demanded by common right as any writ. It likewise lies against the officers of a Corporation to compel them to do their Duty. Where the Statute prescribes a particular mode of remedy, you must follow that mode. It will issue to compel a Court of Probate to do their duty. Where there are private corporations not incorporated Mandamus as them will not lie.

1 Salk 439, 1 Vernon 176, 3 Bac 560, Do - 525, 4 Mod 282, 3 Burr 1266, 11 Co: 93.

1 Ld Raym 103, 1 T. R 331, Cro Eliz 663, 2 Str 871, 1 Salk 271, 2 Burr 1099, Carth 485.

1 Bale 459
11 Co: 94
Cro. L. c. 175
1 Ventr 11
1 Lev: 75 -
Doug 566 -
Esp -

They must act in a corporate capacity - Holmes Case
Doctrine that this writ will not lie where a other
remedy can be had - but there it must be an adequate
remedy.

I shall now point out the manner in which
you are to get this writ - You make an ex parte appli-
cation to the Court in which you state the facts
as they are accompanied by an affidavit - The Court
then issue ens Mandamus - not a peremptory one -
but in that that the Clk for instance do his duty or
return his reasons - If they are insufficient then they
issue a peremptory Mandamus - The truth of the
reasons are now tried by the Jury - not so formerly -
At Com Law - if the return was sufficient the Court
stopped and left the injured party to seek redress by
an action for a false return. By Stat Ann a return
was allowed to be traversed and that Stat is
copied in this Country - If after the peremptory man-
damus issued the fellow does not do his duty the
Ct issue an attachment vs him and put him in
Goal - and keep him there till he does his what he
ought to do - When it issues against a Corporate
capacity, the writ of attachment issues only vs
those who refuse to do their duty - When you re-
cover not only damages but a peremptory Mandamus
when they sue in an action on the Case for false
return as you may also do - It never lies
vs those who are willing to do their duty -
It is said in Salk Rhetorick that an attachment issued

3 B. & 111
1 Vent: 111

1 Salk 432

3 Burr 1445

Cro: 669
3 Bl. C. 111
Salk 149
1 Ld Raym 538
Stra: 56
Ca. 508
Burr 2029

11 Co: 99
Cro: 111

Ld Ray 564
B. & P. 201

Several Writs - Prohibition. Hab: Corpus -

vs alle. those who are nealleng and those who are not. But this is not so. 10 Coke 29 - that the Ct need not issue an attachment but may lay a fine. 6a Ldt 146 1 Bac 287 -

Writ of Prohibition.

This issues from the Supreme Court. It issues to prevent an inferior Court to decide a case not with in their jurisdiction. or where they do follow the form presented by Stat. This writ goes both vs. the party and the Court to stop them both from proceeding. The mode of obtaining this writ is this. the party appears before the Court and there produces the Record of the Case. Sometimes it will not appear on the Record that the subject matter was not without their jurisdiction. then there must be an affidavit. They then issue an prohibition in the alternative, either to stop the suit or send up their reasons for not doing so. The truth of the reasons is tried by Jury. on a petition. The Ct ordering the Petitioners to file a bill in the proper fellow. If they have jurisdiction. then issue an consultation. directing them to proceed. It is a question whether this is a thing of debito justitiæ. The better opinion is, that it is not. This writ issues in Engd from the King Bench. and may issue from any of the Courts of Record. Disobedience is punished by an attachment as in Mandamus. 12 Co: 6 3 B. C. 112 4 Bac 204

1 Bac 262 1 Mod 154 Cro Chz: 736 Barnes Notes 549 1 Salk 549 10 Rep 71 2 H. Blc: 100 3 B. C. 113

Habeas Corpus.

Of this writs there are several kinds some of them never used in this Country. It issues where

Private Arrangements - Habeas Corpus -

when any one has been restrained of his liberty to have his body before the Superior Court - or in vacation before a Judge. A Habeas Corpus ad respondendum is only to bring a person confined in the goal of an inferior Court into a superior one to be charged in a suit. A habeas Corpus ad satisfaciendum is precisely the same as the other only it is a matter of execution. The third kind is a Habeas Corpus ad ~~satisfaciendum~~ testificandum. This is where a superior and inferior Courts have concurrent jurisdiction and the cause and body are removed into the superior Court. This is a writ ex debito justitiæ. When the cause is removed to the Court above the proceedings begin de novo.

3 Black 15 The rule which is laid down in the books that the cause cannot be removed if a rightful cause in the Court below will be abated. the judge thinks not altogether correctly expressed -

The next is the Habeas Corpus ad testificandum. This is not by the party himself but by somebody else - This was formerly said to be a mesne case But the Statute finally determined the dispute. The Judge says it cannot be an escape if the Court have a right to have the writ. The Sheriff however must not take him about the country unnecessarily, or it will be an escape The next is the Habeas Corpus ad subjiciendum. This writ is called by Englishmen the second Magna Charta. Not only the person confined may apply but his or her friends may apply for the writ -

Private Wrongs. Habs. Corpus: Quo Warranto.

The judgt is always that he be released or that he
[illegible] Gaol or be released or be remanded. This writ
[illegible] to whoever has an other in exact Custody and is
not confined to Goals. As where a Man locks up his
wife. She may have habeas Corpus. It affords an universal
remedy for any illegal confinement even by the King him-
self. Parliament have a right to imprison their members
and it is said that a person thus confined cannot
be released by habeas Corpus. Because it is said that
no one can judge of the priviledges and rules of the
Parliament but that body itself. Several eminent
Judges however have said that they will judge of these
cases as well as any others. This writ issues from the K. B.
and from Chancery. It was formerly doubted whether
it could issue in vacation time, and it was finally settled
by Hart. which that is said to be an affirmance of the
Com. Law. This Hart did little more than what the C. L did
before it. This writ has been brought by Children to be released
from restraint by their parents. The Confinement however may
be a Compulsive exertion of parental authority. It lies for Wards
and Wives. Disobedience to this writ is punished as a
Contempt. When a man is in gaol on penal process he
must be remanded. The remedy is not by habeas Corpus.

1 Ble: 131 B.
3 Mod 98
1 Burr 314
6 to Rep 545
2 Vent 243
5 Mod: 22.
1 Vent 332. 346.
1 Salk: 350.
2 Hal P 586. 618
3 Pa C: 7.
10 Mod 429.
Stra: 142.
3 Bla: Rep 136 as to the Hart.
3 Keeb: 526.
2 Lev 128
Stra: 98.
Burr 606.
1 Burr 631

Quo Warranto.

This is when persons claims some fran-
chize or right. as Courts estrays deodands &c. But this
is usually in cases of Corporations. as where a Man claims

960. 295
9 Co: 119
2 Rolle 203
Mod 116
6 Co: Prince 5.
3 Bla Com: C.
Hen 2 91
St Ray 1353

Quo Warranto - Mandamus

1 Salk 174
1 Show 280
2 Burr 869

to be Mayor Aldermen &c &c. the process is as the Corporation by the Corporate name. but if as one particular person then in his name alone.

" " " " " "

be that the writ was given by mistake. as when the officer never returned same process. but returns it not withstanding. Here he has never had a day in Court. and may be relieved by this writ. To obtain this writ you must apply to the proper officer and who this proper is the Judge thinks a matter of some difficulty. The Judge thinks it ought to be the Chief Justice of the Court where the judgt is rendered. But this writ is not given of course. it is not ex debito justitiæ. The Judge has an exparte hearing. and the applicant must produce this proof. He must be satisfied himself that the applicant has a defence. The writ summons the Pltf to appear before the Court to discharge the execution. In every case there is a Bond given to prosecute the suit to effect. and that Bond is in the nature a defensive as

Private Hand. Amended Journal.

of the Execution completely and entirely. The Bonds
es always sufficiently large. If there is no bond
given the Amended Journal is utterly void.
The Court is to discharge the execution and to rec-
overs damages sustained by the Conduct of the
Plff in the original suit. The Bond ought to be
larger than the Execution. There is much reason
& reason between this writ and the writ of Error.
In writ of Error when the officer has begun he must
go on. Recess in Amd. Journal.

1 Bac Ab Amd
Journal.

Evidence — By Stage Reeve

On this subject there are constantly arising new questions in the Courts of practice. But there are a few principles which must be understood and these shall be the subject of this table. This lecture shall be merely a preliminary lecture.

Persons called in to witness are witnesses. What they say is testimony. and testimony is evidence. There are three kinds of testimony from which evidence is derived. 1st Written testimony. and this known all writings from the lowest order to the highest. and this is sometimes used with proof as in case of a Note.

Parol testimony is divided into two — 1st Deposition is parol testimony reduced to writing. 2 Presumptive evidence is derived either from parol or written testimony as the case may be. Presumptive testimony does not directly prove the fact but a certain fact or set of facts from which you infer the principal fact. Circumstantial evidence is where all the circumstances are such that reasonably you cannot be led from the principal fact to another. Thus presumptive evidence may be drawn from existing circumstances. [illegible] leaves Bla acre to B. B yields in 10 [illegible] on regard to payment. and [illegible]

a Contract may be presumed from Strokes en-
tered on the premises and other of his acts -
The Case of the Blood Mare is one frequently men-
tioned in the Books - where one has another sold
a mare and sent her into the house meets an
other with a bloody sword in manner that is
a sufficient proof of his guilt -

In all trials the best evidence that the nature of
the case will admit of should be adduced - Thus
where a contract is reduced to writing parol
proof of it cannot be admitted for it is not the
best proof that the nature of the case admits
of - for where one can produce better testimony
than is there to higher meaning - You cannot
prove a lease or a bed by parol testimony -
I shall now explain the grounds of exclusion
from parol testimony Reason 1st the Court 1st
Precept, your Reference 3d Inspection Attestation 4th
Want of Execution

As to the first it must not be an interest of
nothing but a pecuniary one and an equal is
to the quantity - there is no difference
between one cent and 1000 $ - No Relationship or
Friendship or what one which will be mentioned by
by - But the testimony is always given to obser-
vation and the relationship goes to the
credit but not to the Competency - Reason
of exclusion - the pecuniary ones not of such

because the interest must be an actual and existing one.

An interest in the event excludes but not an interest in the question. There are two kinds of interest in the event direct and consequential and they both exclude. Where the judgment immediately affects the witness as that his property may be taken by the execution there is a direct interest in the event. A consequential interest is where the judgment can ever after be made use of either as testimony or as the ground of an action vs the witness. So where the ruling on which the action is brot can ever after be produced vs the witness. There is a consequential interest and will exclude.

An interest in the question does not exclude and is where the witness has a suit depending on exactly the same principle. As where Hale loans money to Stokes and Hale at 10 per cent and Hale sues Stokes. Hale is a good witness although he is interested in the question. So in trover by A vs B A is interested in the question is good witness although he is interested in the question for the interest is not in the event. This question has been long agitated in the Courts of the U S many contradictory decisions have been made. The Judge thinks the rule as above has been established by all the Courts in the Union.

The relation of Husband & Wife excludes. ~~and~~ the exception is the one before alluded to. In this case where the husband sues for 100£ the Wife has no interest at all - this can not be the reason of the Rule for when there is an interest in the Witness by the C. L and both parties agree to admit him. he may give in his testimony. but not so in this case. This rule is founded on policy. to preserve domestic happiness - But the Law will allow a Wife to swear vs her husband when she is afraid of her life - and vice versa - but these days the Charge is very uncommon - When there is a prosecution vs the husband for the private abuse of his wife the Wife is good Witness - The case of Lord Audley as in the Margin was the first on this subject and has been denied to be Law But in the Ref. of Strange & Leach's Cases this question has in my mind been perfectly settled now it is perfectly settled. and is not the subject of doubt - The Elementary writers that in case of treason the Wife is a good Witness because say they the interest of the Crown is paramount to every thing - But the Charge could never find any support for this exception in the Reports - The Relation between client and Atty. stands on a different principle - An Atty. can never be a Witness for his client's case - By this you must understand that the Atty. is not allowed to swear what any thing was entrusted to him by his client

either at the time of the trial or ever afterwards.
The law will not permit him to swear.
There is one other case and that is the case of a secret entrusted to a friend. The Judge thinks it is morally wrong for him to disclose it and a wrong for the Court to compel him to a disclosure.
But the law in England is that he may be called as a witness and compelled to disclose - and so it is on many of the States.

Cobb 2 E. 13.
3 Esp Ca 25

Cliffs and Wifes cannot be witnesses. There is a rule however which directs that where there are two letters and there is no evidence vs him. the Ct order his name to be struck out and then he becomes a witness. so too where the evidence is slight - to do on the other hand take away the interest of the Cliff and he may become a witness
the ground of their exclusion is interest and that removed they are witnesses.
Infamous persons are excluded. But they must have been convicted of certain crimes before they can be excluded. Those crimes are what concluded in the general term crimen falsi. which is any crime which goes to extinguish his character for integrity thus forgery, perjury, theft &c - constitute the crimen falsi. But the witness cannot be excluded tho he has been convicted and if he was a witness to a contract &c. his hearsay may be proved as tho he were dead. Persons who have had the pillory are not excluded. but their testimony is open to observation
The crime of barratry will exclude a man from

being a Witness. The next class is Atheist. The rule is that nothing is evidence in a court unless it is on oath. Now an Atheist's oath is no sanction whatever to what he says. The law therefore excludes Atheists. It is on this ground that hear testimony as a general rule is inadmissable. But what a man has said under oath that must be heard from another. So what a man says in articulo mortis is admitted is admitted as hearsay testimony because here it is supposed his situation is equivalent to the sanction of an oath. A Hindoo swearing by his Gods is an admissable witness so a Mahomedan. For they both believe in a future state. The reason why these formerly were excluded is that the oath was administered on the Evangelists. This of course had no influence on those sects.

Persons wanting discretion are excluded. As a child is subject to proof because the cannot know the fact judicially. Minors are admitted of course after they are twelve. But before that the Court do enquire whether they have discretion.

There is a ground of exclusion of testimony because it is improper or irrelevant i.e. where it does not go to prove the point in issue. You may enter into testimony to prove that the Witness told a different story out of Court. Because to prove a fact in issue but to impeach the testimony of the Witness.

Evidence.

When you are about to impeach a mans character for truth. here you heare nothing but hearsay testimony. i.e. the Witness tells his general reputation among men.

Written testimony is of three kinds. 1st Records. 2nd Specialties. any writing sealed. 3rd any writing not specialties. By Records is meant the acts of legislative bodies. and the Judgments of Courts these prove themselves they cannot be proved but by inspection of the Records. But as the Records can not be removed. a Copy is high est testimony that can be had of the Records themselves. But as to them proceeded. Copies will not answer by the Com. law. the deed itself must be produced. But the deed is not always required by the Com. law as in the case of a woman dowing for dower. she has not the deed for that belongs to the heir at law and a copy will suffice or parol proof of its contents.

With respects to deeds there is a great deal of [illegible] deed. but not to vary the operation of the [illegible] or to make a condition. but the execution must be proved by parol. so must the delivery. but the consideration that cannot be enquired into. but the consideration can for certain purposes. [illegible] point of law a consideration must appear [illegible] the deed. the parties to the deed only can [illegible] consideration of consideration as there the law [illegible] in damages. but there it does not [illegible] as in equity. the right of recovery.

Evidence.

Another general rule is that no person whatever who has summoned a man as a witness has a right to impeach him. however he may have it in his power. By this is meant that you cannot call another to prove his general character but you may prove other facts which go to disprove his testimony.....
Vide the rule as to interest 2 Wash 2 67)

2 Rand 4 — If a man turns state Evidence he cannot be prosecuted. It is in effect so but no such agreement is actually made

Now consider the case of persons interested. the interest as I have observed must be a pecuniary one and the quantum cannot be examined into. The rule must from necessity be a general one. Interest from affection or relationship does not exclude. An interest in the question does not now exclude but it must be an interest in the event to exclude the witness. The difference between a direct and a consequential interest I have already explained.

5 Rand 92 The mode of ascertaining whether the witness is interested or not is simple. You may tender him the oath &
2 Wash 295 & if you tender him oath you can never after
1 Wash 263 wards contradict his testimony to prove that he is interested
1 Gilm 724 if he stays on his oath that he is not. and vice versa
you cannot make use of both methods in the same
part of the case the Judge can see no principle

5 Rand 55 A person if a man is bound but not by law as if
[illegible] technically to pay the debt of another

he is excluded.
An interest in question did exclude in the case of
usury forgery and perjury. But now it goes to the
credibility and not to the competency. The State
of N. York early adopted the English rule on this
subject. The U. S. Court have likewise adopted
the rule in the case of Bent and Batchelor that
that an interest in the question does not exclude.
The reason of exclusion in perjury is that one man
who conceals one of perjury is entitled to 10£. This
probably is founded on some old Stat.
It is the practice in Chancery that when an instrument
is proved forged it is cancelled, and then is the reason
of the exclusion in these cases. The Judge submissions
the same to be the reason in cases of usury, but
says it is a mere conjecture. It thus becomes an
interest in the event. Lord Mansfield says the only
question is whether the payment can now be
used as the Statute of Limitations. If it can then he is excluded
if not then he is to be admitted. The case of
Bateman has determined that rule and now
holds in civil and criminal cases.
The exceptions to the general rule are numerous
and many. The first is on the ground of necessity
and then necessarily must be so, on that ground the
rule is dispensed with. The case of the
must be, old and musty papers. Those by the Act

Hawkins 364
B. C. S.

1 Burr 2251
Rex
against Inhabitants
of Hay
1 Leach 299
6 Mod 68

Evidence.

Bac Abr 331
2 Hale 285
2 Mod 144
2 Mod 143

If Hobbs sue the hundred is liable for a Robbery. In this case the person robbed may be a Witness in his own action vs the hundred - else the law would be unjust. - Under this head of necessity a question has been made whether a daughter can be a Witness in a suit brot by her father vs her Debtor. The Judge this case does not come in here for she has no interest either in the question or event. The case of Guardian or Prochein Ami does not fall under this head for they have no interest in the suit. - No Army can ever be a Witness unless he is indemnified for his Costs -

Bac Abr 1054

Bac Abr 506
Hale 306

Again it has been held that in common suits as penal Actions you must let the Plff be a Witness on the ground of necessity. But the law does not mean to extend to such cases but only to such as Robbery &c - Upon this ground it is that Plff may call a Boy that to be Witnesses in their own suits because he only could swear to what no other person could prove - reasoning thus from principle of necessity -

On this ground of necessity likewise is the case of an escaped prisoner, a Witness vs a Plff in case of a voluntary escape but not in negligent escape. In case of a voluntary escape the Plff cannot take the escaped prisoner in Execution - The case of a prisoner taken

Evidence.

on precisely the same ground as the B. of S. Action case. Teak Co.: 124
The officer himself is a witness from necessity, i. e. his 6 Mod 211
return on his mesne process is evidence - prima facie 2 Show 647
proof. but not conclusive. The person rescued is the witness in an action vs the Rescuer.

The case a reward given by law for apprehending felons is on the ground of necessity, because the person apprehending is a witness 2 Leach 815.

The case of joint tort feasors is on the same ground as the theft may also be instanced. The exception to the general rule founded in civil cases. Because the fact cannot be proved often but by one of the parties themselves as in the case of accomplices.

Agents may be admitted as witnesses for and against their principals in civil actions. There is case where a person paying money for his father overpaid the sum due. A case took up the obligation, in an action brot by father vs the obligee for the overplus. son was admitted as a witness for he had consent to the father. The case of factor is on the same principle the principal called the first factor. who only denied the agency but not the bailment. It was objected that he was interested. but the was admitted on the ground of necessity 5 Wils: 40 2 W. Bla 510

The law with respect to Corporations as subjects is somewhat confused on the Reason. Members were sometimes admitted in case same cases excluded. It is certain now that all Corporations where the Members as such are not individually liable for any loss. the Members are admitted as

Evidence

Peake 6. 153 Helnesses i.e. where the loss falls on the persons as in case of a charitable Corporation. Thus

1 Vent 351 where the Members of a certain Corporation
Hobt 92 claim to go tale free thro a certain Turnpike
1 Skinner 174 Gate. they are not Helnesses for the loss if any
2 Levins 231 falls on the Gate Keeper
2 Hanover 422

Nelson 422 There is a Law in England inflicting a penalty
Camp 199 on the Barber and a Barbee at an election. these
3 East 451 cases likewise go on the ground of necessity. The
Judge thinks that in 4 East 180 the Question is
settled.

Sometimes persons become interested after the event & yet have a right to their testimony but they are not to be excluded. but with some exceptions however. But if a man become a Helness by the act of God or any way honestly his testimony is inadmissable.

Ward. 184 Where a persons interest is completely balanced he
Str. 406 may be admitted as a Helness. there may be many
Com: Rep. 259 such cases as you may here cases.

The Inhabitants of a County were admitted as Helnesses when the County was indicted for not repairing a Bridge. they were admitted because their interest was balanced. pleas may receive the Rate.

2 D. R. 480 There are cases when by the C. L. without
1 R. R. 281 the intervention of Act persons interested are
admitted. Parties themselves are admitted
as Helnesses on the ground of necessity

There are cases where the C. Law presumes
of the evidence has been received by Act. these Helnesses must in the different Rules as to Competency

of Bond debt and ~~mere~~ account and Bettes ~~=~~

Courts of Chancery recognize the same rule of evidence as the Courts of Law with their difference that they appear to the conscience of the parties themselves. But the answer of the party is not conclusive any where to the Judges knowledge but in Contempt.

It has been contended that where a man is made a Bankrupt by Act he must be effected before he can take the benefit of it now settled that he has an act to testify without being effected. A man on the Bankrupt Law by E. L. no man is compelled to give evidence contrary to his own interest but there are some cases by statutes which differ in the different Orders in which he is

Generally speaking on sale of Lands no person whose hands is part can be a Witness but if the interest can be released he may be a Witness and if the party who is liable to you and refuses to accept the release you may lodge with the Court and discharge him.

With respect to a wife declaration because it has been the constant practice to admit the fellow but the Judge thinks it ought not to be because of his interest. But of it is a bargain of Lands then as there would be no common law of course no interest he would be a Witness. The Judge thinks that where the parties ~~were~~ entered into the contract under a full knowledge of the Statute Law that ~~there~~ could be no recovery from the Vendor of the [illegible]

Evidence

A mere trustee having the legal title cannot be a witness for he is indemnified for his costs. But where he is not a party on the record he is called as a witness his having the legal title is no objection whatever because he is no way interested

Please state to your Hon that where a man is interested not legally but in honour he ought not be rejected

A man was called to testify and objected on the ground of his having taken a lease but said he was bound verbally to take a lease

Mod 21

Be the ground had as great an interest depending upon his mind at the time he was called to testify, you see the principle is that if a man expects to gain or lose any thing by the trial he is incapable. A is tenant for life at a B. remainder man. A can break the entailment at any time. Now in this case B. could not be a witness because his is a real interest. But suppose A's son is called to testify, he is admitted notwithstanding his relationship.

There is a case in 4 T. R 678 and in 2 H. 263 both of which go to establish the principle that a wife cannot be witness in husbands case and vice versa on grounds of policy. It is not on the ground of interest.

A question has been made whether a Defendant can be admitted as witness. But the cases that have arisen appear on the same footing as any body else. The Defendant is admitted here as a witness.

3. If a woman is carried off and forcibly married, the Defendant is a witness to prove the force.

Evidence.

There has been a question whether a divorced wife can be a witness as to any thing that transpired during coverture. It has been decided that she cannot. She appears to be in opposition to the principle laid down in case of a secret commissioner to a confidential friend. the decision however is correct.

The rule is that no man shall be obliged to disclose any thing that may subject him to a suit or a prosecution. But the rule laid down by the elementary writers on this subject is somewhat vague. But if a disclosure would be the means of his conviction the case does not come within the reason of the rule that no person shall be obliged to testify concerning his own turpitude &c.

Persons infamous are excluded. Who are infamous has already been stated. they formerly supposed that it was not the infamy of the crime but the infamy of the punishment that excluded. but that doctrine is now exploded. The Record of conviction must be produced to exclude the infamous person. The Ct of Co[illegible] however dispenses with the rule [illegible] person convicted of the crimen falsi to [illegible] they went upon the ground that a long life of upright conduct rebutted [illegible] There have been three cases of this kind in this [illegible] and more than Ned. [illegible]

his life had never been very correct.

Again, there is a rule in the English law that when is pardoned he is restored to his credit. The Judge thinks that rule is not founded in good sense. If the pardon proceeded on the ground that he was innocent then there would be sense in the rule. But a pardon never proceeds upon that principle but it is a mere act of mercy, adopted for some good political purpose. But it is not in all cases that a pardon will remove. Where a statute inflicts as a punishment, besides other things, that a man shall be incapable of being a witness a pardon does not remove him. for the incapacity is part of the punishment of the Ct. But where the incapacity is a consequence of the conviction a pardon removes the incapacity.

As to his character as to truth never or slander but it is always open to examination as has been before observed. The Judge thinks we have carried that rule much more in this country than in England and unprofitably. A rule permitting an enquiry into a man's character for integrity generally would be very useful. You may prove that a witness has told a different story out of Court from what he has in Court merely to prove that he is an incorrect one.

A confession of a subsequent witness on his credit is not the subject of a bill was admitted

Evidence -

Atheism is the next examination. The Common law is altered as to the Calvinists & Quakers by Statute 8 & 9 W. 3. c. 24. But now all persons believing in a future state of rewards & punishments are admitted. The Witnesses however must be sworn according to their own mode. Excommunicated persons in England are excluded. Quakers by law are admitted in civil cases and criminal cases as Witnesses on their affirmation in their Courts. 2 Burr 1117 there is an opinion on the subject by Denison J.

Vent 21
Co Litt. b
H.S.C. 43
Gil. L. 148
Mich. 8
Ld. Ray. 1104

Cowp. 370
Fitz. 864
2 Str.
Peake Ev. 9.
Lord Raym. 147
Ry Walk.

The exclusion of Atheists is a necessary consequence of the rule. But they have carried them further. and have not only excluded persons who disbelieve the existence of the Deity but those who deny a future state. Hence is a clause in this Statute in Consideration of persons in the less solemn way. (now printing) - - -

Persons not having discretion are the next class of persons who are incompetent Witnesses. Persons who do not understand the nature of an oath are excluded. With respect to Infants there is no precise rule laid down. But the age of 12 and some say 14. that they are enquired of whether they understand the nature of an oath. Some authors say that under 9 they are not admissible. The Books always that the Evidence there is no such rule. the Question is whether they understand the nature of an oath

Hale 300
H.P.C. 278
Leach 228
1 Str. 556

Evidence

It is the practise in the English Ct that where very young children are introduced as witnesses the Court sometimes takes no oath, and any persons may be known to corroborate their story. This is the only instance of a story without oath being admitted as evidence in a Ct.

1 T.R. 296 There has been introduced by Lord Mansfield a new ground of exclusion which has never been exploded. That no man the he had ceased to be interested. if he had given currency to an instrument should be a competent Witness to ~~testify concerning~~ invalidate that instrument - It was the case of Moulton and Shelly - the case was a note was given and the indorser was called to prove that it was usurious between the original parties. the note & hand however was taken up and a new obligation given. he was excluded on the ground above mentioned. In 3 T.R. 27 it was held to be competent to negotiate instruments. In 1 T.R. 601 there was a similar decision. and in Peake C. 224, the opinion there given go to destroy the whole effect of the rule. But Penn rule settled that they have given up the first case.

With respect to the rule that you must produce the best evidence the nature of the case will admit of. you must understand that may make use of lower evidence when you can prove that the higher was lost - as by fire.

duly proved. It must be satisfactorily shown that it was lost before their testimony can be produced. When there is a written contract that must be produced or the pltff's suit fails the exception just above mentioned. So the letters and papers must be produced. In case a battery of party calls witnesses who were 10 Rods off when the men other only 2 Rods off. you must admit the former. but a suspicion may be raised that the latter were kept back.

With respect to hearsay testimony this is not regularly admissible. that means that a Witness shall testify to a story not told under oath. But to this there is an exception to wit that when a Witness is introduced the opposite party may introduce testimony that he told a different story out of Court. this however proves not a fact but only the inconsistency of the Witness. so too where the Witness is very young you may introduce Witnesses to prove that he told the same story before. either in the same manner or differently. by the one party or the other.

The second class of cases is that of confessions of the parties out of Court. these are to be rejected. but what the parties have said which operate against them is admitted as the best proof. but the whole story must be related and not a part. for one part may explain the other.

Evidence

If a man confesses that he committed a particular crime (as forgery) this confession is not testimony as him unless he tells the facts accompanying it, for he may not know what forgery is - but if he tells the facts there is good testimony as him - A confession before a Justice taken down by him in writing is good evidence. The confession of one man can never operate upon another because it is no testimony under oath - Thus where A. B. & C burn a store, and A confesses that he & the rest did it. This is testimony only as him but not as the others. In such case A name may be struck out of the record, and he may be admitted as Witness as the other.

There is a difference between confessions in Cts of law and in Equity. An admission in a Ct of law are only had when and are not under oath. But an answer in a Ct of Chy can never after be contradicted because it is on oath. But an answer made by Defendant in Chy does not bind the Plaintiff. So in the case of naked Defendant. His answer is not evidence as the testimony in court.

Confessions obtained from persons charged by a Justice by threats or flatteries are not admissible in a Ct of Justice. But a confession that is free & voluntary & is made in due manner, is admissible.

Evidence 59
3 Mod 45 §

Evidence.

I now come to the third exception to the rule and which is the most important one precise. I mean what do persons have said with respect to boundaries of land. This is an exception of hearsay testimony from necessity.

Hearsay testimony from necessity is admitted to prove the death of a man who has gone abroad. All reports respecting his health or his death are admissible. They are the best evidence you can expect. This testimony is enough to grant administration on a mans estate, and to release from marriage.

It is said a mans pedigree may be proved by hearsay. But it is denied that the heralds office must be resorted to in such case. But the Judge Chambers is no objection to the rule. because the offices make out pedigrees to please people and here where there are no heralds books, there can be no objection.

It is the only evidence you can have when a mans testimony is to be impeached. His character in his neighbourhood is to be proved. The Witness is ought to say what he knows about him. but what his character is among his neighbours.

There are cases in which the character of the parties may be enquired into. and where it may not. The rule is that if the character be put in issue you may enquire into it. Where A sells B a horse but where an action is brot for a cheat. B cannot prove his character as an honest man. So where a man has committed [illegible] you cannot prove malice

But you can prove the character when it would entitle to greater or less damages - In an action of Slander for saying that A. fillip stole - the Def may prove As character as to truth - But in case on a battery you can not prove that the Pl is a quarrelsome fellow - for this would have no effect upon the verdict - In crim con. the wifes character as to constancy may be enquired into - because this would lessen the damages - So the mans own character is put in issue. So it may be proved that he himself contributed to the seduction of his wife -

B.N.P. 296
4 Esp. Dig. 50

All Contracts for any unlawful purpose are illegal - Where a Bond was given to a Kept Mistress it was held that it was good if it was premium pudicitia - But if she was a Lewd woman at the time of the Bond given the Bond was void - Thus you must enquire into upon the character of the woman when she sued on the Bond - But now the law is that the Bond is valid when given either before or after seduction -

It is upon the principle above mentioned that the Pltff in Slander always states and proves that his character is good -

In criminal cases - the party may show that 1 B. & B. 552
his character was good whether it is in issue or not - But the public cannot show that it was bad - unless to rebut the evidence of his good character

Here are some observations I have to

Evidence.

make no exception to the number of Witnesses. The general rule that one Witness is sufficient. But to this rule there are exceptions. The Canon law requires two Witnesses. The reason of the severity of the C.L is that the trial in Engd was by a Jury from the vicinity. and they knew the facts by supposition.

It is said that the proceedings in Chy furnish an exception to this rule. they certainly do in a certain way. Here the party himself swears. and when there is but one Witness the testimony is balanced. But where there were others witnesses to other facts but not to the principal one. they have often turned the scale.

In case of perjury at C.L. there is more than one Witness required. and they stand on the same ground as the former. for here would be oath vs oath. and then they would be balanced. The case of treason is by an Act Statute. which requires two Witnesses. But the 2 have not required when there were two overt acts. two Witnesses to each act. One may swear to one act and the other to the other. and that is sufficient proof. One Witness cannot convict a man of a capital offence by the Comm Law. but if there are strong corroborating circumstances together with the oath of one it will convict a man.

Ca. tabl 146
Hyon 1825-
2 Ray 220

2 Vern 554
2 Hawk 428

16 Mod 94
2 Blair

What an Agent has done may be done as the principal. but the Agent must be constituted for that particular thing. the Agent

himself need not be called. On this ground whether the wife has sued apt her husband or husband in which she acts as his agent is admitted as the husband because what she says is what he says. but to no greater extent than her agency.

1 Atk. 527
1 Esp. Dig. 142
2 Atk. 104
3 T.R. 254
3 T.R. 668

Transaction brot by husband & wife on her right she may be examined. Their statements on separate grounds. She is not in this case his agent. The note of that is the subject of the suit is not the husband as tho he has received it to prosperson. So whatever she says she says apt her own interest.

6 T.R. 680

Where a party offers a compromise this cannot be proved as him. But if in the offer to compromise he admits the cause of action there is good proof as him.

B. & P. 236

Again there are cases where a man cannot avail himself of the truth. and these cases are where a man sets himself for a tavern keeper for instance and he is sued as such he cannot know that he is not a tavern keeper. So too where a man trusts off a woman for his wife. or she runs in debt. he cannot then know that she is not. There are two kinds of presumption. of law and of fact. In these cases the presumption is that he is a tavern keeper. this is a presumption of law and cannot be rebutted.

2 Ld. Raym. 1032
1 T.R.

In 2d. There is no presumption as to

Bonas. and where a Bona has lain 18 years - 12 Ves. 5 -
there is a presumption that it is paid. but there is 1 D.R. 399
a presumption of fact and may be rebutted.
The Judge thinks we should be extremely cautious
in admitting presumptive proof. Where on a lease 2 Ray. 1370
the lessee has paid the rent for the last several 3 B.C. 371
years. there is a presumption that he paid the 1 Bl. H. 552
rent due before. 2 Str. 826

With respect to father or mother being Witnesses to
prove the illegitimacy of their children. Shaw
may make some observations. To Mansfield says
they may be introduced to prove that the child
was born before marriage. By the Com. Law a child
born before wedlock is illegitimate. But Lo Mansfield
says that a father or mother shall never be admitted Ex. p. 5 Ves. 591
to prove that a child born after marriage is not Bardens 79
the issue of the reputed father. - Another question
has arisen whether the Wife can prove connexion
with another man. She may be admitted. but she
shall not prove no access of her husband. - - -

Another question has arisen whether persons
who have lived together as husband and Wife can
be admitted to prove that they are not - But this
cannot clearly. There are but two cases on
this subject directly opposed to each other the
one in Bunb. S. C. 504 says they can and in 2
Str. same book it is they cannot. Peake Ca. 22

Evidence.

There is an opinion which seems to lean to the side that could be admitted by Ld Kenyon he admitted the mother to prove that there never had been any banns published which circumstance would by that opinion make the marriage void. (Previous to the stat 26th Geo II the opinions were that the marriages were valid without this further ceremony).

6 T.R. 330.

The Mode of proof When Witnesses testify they are to testify to facts. Inferences and opinions are not as a general rule to be regarded. To draw inferences is the province of the Ct and jury. To this rule however there are exceptions there are cases where opinions are to be admitted as testimony. Thus where the value of a particular piece of land is to be ascertained. There the opinion of a man who has been on the premises is admitted. So too the opinions of professional men on the cause of a distemper on the fact of insanity &c. may be admitted as testimony.

1 Carr & P. 89. 2 Ble Rep 1113

The Manner of getting Witnesses into Court. In most of the States the proper authority to resort to is the Ct. who issues a subpoena. which is a summons directing him to come and testify. Thus he is obliged to obey provided the man calling him has tendered him the Witness fee. which indeed [illegible] Witnesses are in such case as a Common

1 U. 510
2 Hale 1151

Contempt of Court. Dist of Dur. a question answered
suppose the Cause does not come on the first day
is the Witness obliged to carry the second
day if the party does not tender the fees. The Judge
thinks he is not obliged to stay unless his expen-
ses are tendered to him. --

If after summons the Witness does not
appear. the Ct may issue a Capias to have his
body taken and brot into Court. The consequence
is that he is liable to fine. and he may be
imprisoned by the Ct. But suppose he comes
and wont swear. the Ct may commit him to
jail for a Contempt. and he may be kept there
like the next Term.

But what is to be done if the Witness escapes:
The Witness is certainly liable to his fine. The
party too may have his action on him. if he can
make it appear that he lost his cause by want
of their material testimony. But a man is not
liable to any of these punishments if he has a
reasonable excuse no wickedness &c.

In criminal cases the Ct of inquiry
have power to bind over Witnesses to compear
them to appear at the trial. This says the
Judge may operate as a hard case. for these bonds
may be required of Strangers travellers.

Hawk. P.

Evidence

2 Salk 405 If however you want any papers belonging to your Witness you issue a subpoena duces tecum. The Ct however dus grant with the introduction of voluminous books proved

If there is a person in prison who is a Comyns 672 Witness the Ct order his body to be brot up. 3 Burr 1244 Formerly in Engd the Sheriff was liable for an escape in such a case but now it is otherwise.

The party summoning the Witness is first to examine the Witness & then the other party cross examines him. It was the rule of the Common law to examine Witnesses apart from each other.

3 Bl. 754 The Witness may always refresh his memory by referring to any notes in his profession.

The next subject is the privilege of Witness from arrest. The object is to prevent his body being taken. This privilege however must not be embraced by going a circuitous rout &c. Thus right he has with out any right of protection. how then is it to be preserved. Suppose he is arrested the Ct will release him. but the officer does not become liable to the Witness in false imprisonment. Neither is he at first discharged. it is only a freedom from arrest that the Witness enjoys &c.

Evidence.

When the Witness is released the Ct gives him his protection which in Engd is called a dispensation. The Cts of U. S. grant the protection before the Witness leaves his home. If then he produces his protection to the officer and the officer persists then he is guilty of false imprisonment. The difference of practice causes the difference of opinion on this subject. In Perkins Case in 1 Peters C.C. as you will find a case in point.

1 Salk 564
2 Bla R. 1125, 19
2 Comb. 274
Brown. 15
Str. 101
2 Mod 161
Rolle 270
Viner 516

Affirmative testimony is always to weigh. It is said. But says the Chief negative testimony is sometimes as good as affirmative. Other things being equal. The truth is that according to the nature of the case the man swearing in the affirmative must have been mistaken. negative testimony must weigh.

I shall now make some observations respecting depositions. There is a particular kind of deposition made by the parties called affidavit. These have nothing to do with the merits of the case. By the C. L. depositions were not known. They are extensively used in Eng. Where Witness is about to die whose testimony is material. It may be procured perpetuam memoriam rei. This is by statute is adopted by all the States.

There are cases where depositions are taken by the C. L. as where the Witness is very sick or is in a foreign Country. There is a statute in Md. 1

on this subject. The Ct recommend the reading of the depositions in Engd. once the parties usually submit. This dispenses however only on practice of the Ct. -

Depositions there observed to you are taken in Ct of Chy once there are admitted in a Ct of law. When an issue is sent out of Chy to be tried in a Ct of law.

In Connt and other States where depositions are used by force of Stat. they may be taken of a Witness who lives more than twenty in County in some it is more than thirty. depositions here are used just as they are in a Ct of Law. The party is obliged to give notice to his antagonist if he or his atty lives within twenty miles that he may cross examine. They may likewise be taken in all those cases when they may be taken in Engd. The deposition must always be in the hand writing of the Witness or else the Justice must take it from her mouth. but it cannot be taken by the party or his Atty.

In criminal cases depositions are always excluded. In criminal cases it is usual for the publick to summon in the Witnesses. but the accused send to pay his expenses if the criminal is poor. and his atty says that the testimony is important. In some States Justices of the peace have no power to take depositions as in Virginia. the Ct of Connt in such case however admits the depositions on the motion of the criminal usage -

Evidence -

The deposition must be sealed up and directed to the Ct. that the Justices may deliver it to the Ct themselves - These depositions are yet good evidence - since a deposition once taken is always good evidence between the same parties - but it cannot be used where any stranger is concerned -

4 Mod 124
1 Salk 279

It has been a question whether a copy of a deposition which has been lost can be examined - There is no decision on the point - The party however may swear any heard may move to have it filed and it then becomes a part of the Records of the Ct -

It has been a question in Engd whether a deposition can be taken 1 Atk 446

There is one question on which there are conflicting opinions, i.e. when a deposition is taken of a man who becomes interested before the deposition is used. It has been contended that the dep[osition] ought not to be used - The judge thinks it may be admitted - and examplifies the case of an infamous person and a dead man - whose depositions may be taken after their conviction or death. The argument of such authorities however is that they are not to be admitted -

Evidence.

Records.

Records are of different kinds. Records are properly acts of the Legislature and judges of the same. These cannot be contradicted. You can plead there is no such Record and that is to be tried by the Court. You can never introduce any parol testimony. You must produce the Record or either a copy of it exemplified by the proper officer.

Co. Litt 290 Private Acts must be exemplified by the proper officer. The law as to exemplifying is different. Sometimes the Record is required and sometimes not. These Copies are called office Copies. But if the officer should be sick or absent, you may get any body to copy, but he must swear that it is a true copy and then must accompany the Record else an exhibit will never suffice.

Vol. 2. 67. 13.

Vol. 2. 317. 23.

A fact that has once been decided. That fact is conclusive between the parties or privies of the Record. So if you attempt to try the fact in issue by some concurrent action there can be no recovery. For the injury being the same and the evidence the same. The former judgt is a bar. But a Judgt on Demurrer. Because the Record. Defendant is no bar. as where suit is on Record under to plead the Statute of Limit. Judgt as to this or demurrer is no bar to [illegible]

Evidence.

In a real action between A & B. where there are 10 acres of land and A sues for one the wholy depend on the same title of a Jury find a special verdict the finds found no conclusive evidence for the one part for the other seven acres - Gel: 2 Ed: 25 B. Ch. P. 230

Thus an action is brot. by A. against B. for a right of way. the verdict finds that he has no right. there is conclusive between the parties. the fact however must be directly found to be conclusive. for if the jury find a special verdict that such a one such were the facts they would only misch. 3 East 544 6 Co. 7.

Whatever verdict may be found in favour of one man in one trial. that is not conclusive between him and another person. It is however conclusive between the parties - 20 May. 30 Hardres 72 Gel. 2 Ed. 25 Hammerton & Pitt. 6 Ves.

There is a single case where a fact is found for a man it is conclusive upon one man and another & that is the case of a public right. but as to private rights it is not so.

Verdicts in criminal cases have been attempted to be given in evidence in civil cases. but they have been rejected. Hale 341 2 Ld. Ray. 1176

When property is concerned decrees in favour of the public vest the property in the public. the decree is conclusive. 2 Vern. 387

How are you to prove the case of another state. you prove it by the Statute Book of the state printed by authority. or to prove it by a certificate which must be sworn to -

Evidence.

The common law is to be proved as any other fact is by Witnesses who know.
As to the general laws of the State in which you live them. it is supposed the jurors know them and you need not produce them. March 6th 1873

There are cases where the answer of the Testimony given by a witness is taken advantage of by other persons This is on the footing of a confession and is not objected to generally and always laid down respecting Treaties being evidence only between the parties.

1 Dall 220
1 Pet. C.C. 285
7 N.H. 2

But the whole answer must be produced. and not a part.

5 Mod 10

Now there is an exception respecting the evidence of a man to Witness out of the State and can not be found. his deposition is admissable between the same parties. but if he can be found and is living the deposition cannot be found. But even then it can be used to contradict his testimony then given. i.e. that his testimony and deposition do not tally. but the deposition cannot be used to prove any fact - but only the inconsistency of the Witness — and by way of impeachment.

Salk 286
2 Ld Ra 820
5 Mod 283

Foreign judgments are not conclusive. but only prima facie evidence. they stand good till they are proved void. Some have supposed that treaties in Sister States have the same force in their State as laws given by the Constitution. and others consider them as foreign treaties the Stamps under the framers of the Constitution

Bovey 1st

Evidence.

intended that the judgts given in one State should be conclusive in another. The Judge thinks the States must finally come into the Union. The contrary reckons the bane of Union. The letter to Lord Kent the judgts given in the Colonies as foreign judgts. That the Judge thinks is not a good ground of the refractory States opinion. and besides it is contrary to the Spirit of the Constitution. The State of N. York consider them as foreign judgts. in Court they are binding.

With respect to judgts of Ct of Admiralty they are binding. because the Lex Mercatoria is the Com. law of commercial world. That a judgt given in a Ct of Admiralty at Hamburg is conclusive in Ct. York. — A ship for instance is judged good prize in a Ct. Then subsequent action is binding. A ship is wrongfully condemned and is ransomed. She is taken by a Belligerent and condemned on the pretence of her not being neutral. Now that judgt is conclusive. even tho it was a fraudulent case.

But if a State is condemned on a ground not recognized by the Law of Nations that judgt is not conclusive. Thus if under the Berlin and Milan decrees a Ship should be condemned for having spoken an English Ship. That condemnation would not be conclusive. and the courts would not be found liable. But whenever the decision is on any ground of the Law of Nations it is conclusive.

Evidence.

There are certain things which are required to be recorded. and there are others which are not required to be recorded and yet are recorded and are evidences. Here makes a further distinction. Where there must be a record by law. you must produce the Record. if it can be had. and if not. then you may produce parol testimony. But there are other cases where there is no interference of law on which the Courts yet admit them records. as in case of the Records in a family Bible.

So inscriptions on tomb stones have been admitted on the same grounds. without any interference of law.

So Histories are proof in some measure. but not as to any particular matter related between the parties.

Confirmation Books are evidence of what has been done from year to year by the Corporation. The originals should regularly be produced - but sometimes they have been dispensed with.

Pshaile now attends to instruments in writing of a private Nature. Some things cannot be proved by parol. as title to land. so too in other cases. where you might have proved parol proof. yet if the title is in writing you must produce the Contract. So the Ingress to pay the debt of another by the Statute of frauds must be in writing. else you cannot prove parol proof.

Jefferson 130
Ld 93
305

Evidence.

Where the original of a record can be had it is not necessary that you should have a copy. and indeed it may be a doubt whether the copy in such case ought to be admitted.

But with respect to private writings the original must be produced. But in case of a woman suing for dower. this rule is dispensed with for she has not the Command of the title deeds. she may show that there are such deeds and their contents by parol. But if the title deed is in the power of the person. she must produce it. And then is the ground why a man may prove the contents of an instrument which is lost. or which is in the possession of the adverse party. - ...

10 Co. Litt 69 a
3 T.R. 181
14 Eng. L. & Eq. 5 & 6
1 Atk. 5 & 6

Copies of recorded deeds are admitted on the ground that they are not in the power of person. In Engd the title Deeds are conveyed down with the conveyance. But the practice here is different. and there gives much room for roguery. & so it is too in N. York. a very bad practice says the Judge. They have not guarded as they ought & cases may here so long suffered by ordering the title deeds to be given over

In all private writings you must prove the execution and delivery. else it leaves [illegible] nothing. The mode of proof is different in different writings. some writings must have certain special writings. But no [illegible]

to prove note and if there is no person who saw the transaction note etc you may prove the hand writing. But there are cases where the case requires instrumental witnesses as in case of a devise of lands which requires three witnesses. And where three witnesses cannot be had. you may prove their hand writing. and the inference is that they signed ~~&c~~ in the presence of the testator this is the best evidence that can be had.

Parol testimony cannot be admitted to prove the meaning of a deed but it may be admitted to prove its execution. So too. parol proof may be admitted to prove that a deed was delivered to a third person as an escrow. But if there has grown a very interesting question.....1813.

There is a rule laid down that it cannot be delivered to the person himself as an escrow. and out this has given the question above mentioned The decisions are confused. The Judge has examined the cases and says they turn on the word Delivered. A man may deliver a deed to a man and at the same time requires a concurrent act. If the act is not performed. the deed is not delivered. The cases are irreconcilable distinction. and they are confounded to

Continued -

reason and common sense - This is the case not withstanding the rule that whatever you add to a delivery is void - This distinction under stood there is no contradiction in the decisions. In Bro C. 520 & 835 - you will find cases on this subject - and in Bro C. 864 - With this distinction in mind you will easily reconcile those cases which are apparently contradictory - In Bro C. 835 the case is that of deceased - The only question is was the deed delivered? -

There is frequently much doubt what is a delivery - Every thing about a delivery is by parol - and it depends on all the concomitant circumstances - and you may leave it to the jury to infer the delivery - If there appears to be an intention to deliver it - that is enough But general evidence of the delivery of a deed may be rebutted - Possession of a deed from the grantor is evidence of a delivery - tho it may be come by wrongfully -

The contents of a deed can not may be proved by parol - A deed thus is proving title to land by parol - but there are cases - that goes on the ground that you have a conveyance of a certain estate - must look from you your title -

It has been a question who and time for you can introduce parol proof to vary the consideration - One thing is clear

that between the parties you can never produce parol proof that is no consideration the case goes on the ground that the deed is itself a Consideration if there is no then it is void between the parties.

But there are some cases where you may enquire into the consideration respecting the consideration between the parties. There are some cases where you may enquire into the quantum of the consideration between the parties and there are where the Contract is entered into between the parties for the performance of some act with a bond for damages in case of non performance. Here you may enquire into the question of the consideration for the damages may be merely nominal there must indeed be a recovery.

But there are cases where you cannot enquire into the consideration at all and there are where the action lies on them does not assume on damages at all. as in case of debt where you must recover the whole by action at all. If the action sounds in damages you may enquire into the quantum of consideration if it does not you cannot.

As to Licenses you may enquire into the consideration at all times

In all cases where third persons are entitled in a conveyance they may come in and show there was no consideration.

In deeds there is often a consideration extended. this furnishes only prima facie evidence. that is all was the sum

A simple contract is a writing not sealed there are cases where the law requires they should be in writing - and where it does not require they should be in writing and yet are - as a promise to pay 100$ for a horse. In the first case the case is likewise you can not introduce any other but written testimony. It is a rule of C.L. that whenever you found your claim on the writing - you must make proof of it. the writing is the evidence of a contract in the first instance and the action. the same rule as to parol testimony prevails here as in deeds. If there is an ambiguity in the contract. the court must give a construction. nor can you vary a parol agreement by it. But if the ambiguity is latent. i.e. if the ambiguity arises from something not on the face of the contract then you may produce parol testimony to explain this ambiguity. this rule is drawn from the case of devises. and is similar to that

in those Cases -

There may be equivocal words used & parol evidence may be used to show what was meant. If however the ambiguity arises from the Construction of sentences the Ct must explain it if they can. and if not then the Contract must wholly fail -

There is another exception. There may be a Term of art used. which term may mean one thing under certain circumstances of a Means family. and another under different circumstances. Parol proof may be produced to prove the circumstances of the family. Thus a devise is made to B & children - if he has no Children he takes the fee if he has children he takes an estate tail if he & children he takes as joint tenants with them - you may here enquire into the state of the family -

Again you may let in parol testimony to ascertain from the ambiguity of the writing which of the family was meant. But this must not contradict the writing. but must aid & construe - with it - A woman has 4 Children by J. L. afterwards marries B. S - and by him has 2 - A devises B. Share to the 4 Children of the woman here you may introduce parol proof to show the 4 Children by which were meant - this stands on the same ground with the Will - he also says I give to the children born of - here you cannot receive by parol that the Children of Esther were meant for that would be to add to the Will -

Con't. cc -

Again you may resort to the Words of the first
ents to know what the Testator meant. E. g -
P. S - gives his farm to T. R. without any words
of inheritance - on a consideration of his paying
his debts. Now this on the face of the rule
is only an estate for life - But the Testators
debts may amount to nearly the value
of the farm - from this and other circum
stances it may be inferred that he meant
to give the fee -

Again P. S. makes his will and
says I give my house called the Bell Tavern
to A. R. this only gives an estate for life.
But Tom already had a life estate in it he
then meant to give him the fee. or
the reversion &c - the deeds of the parents
to engineers - and so from this the Testators
meaning is inferred. —

I shall now [illegible] what parol testimony may be
admitted to shew an equity. As a rule that
may controul a fraud proof to shew an equity.
It is held even that an instrument is frequently
differently construed in a Ct of Eq from what it
is in a Ct of Law. Thus we know in a Ct of Eq
[illegible] can redeem the premises tho' he cannot
do it at law. The mortgagee on failure of the mort
gagor to redeem at law may foreclose - For the cases when
a Ct of Eq will [illegible] in a Ct of Law what is not

recognized [illegible] law. that right may be set aside by parol proof - This is an [illegible] rule - It is a settled rule of law that where a man dies and makes a Will - after all the [illegible] his debts &c. are paid - the residuum goes to the Exor. Equity says yes it is his provided the Testator hath not made provision for him in the Will for then the presumption is that the Testator meant he should not have the residuum. The legal construction then is that the Executor must take the residuum. the equitable one that it should be divided as tho: no will had been made. Now you may introduce parol proof to rebut the equitable construction -
But suppose on the other hand the Testator [illegible] [illegible] his Executor and should [illegible] he did not intend that Ex- should take the residuum - now this parol proof cannot be admitted for that would go to destroy the legal construction of the Will -
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] that [illegible] [illegible] construction [illegible]
[illegible] might be rebutted - so in the case above -

[illegible] given to an intended wife binding the [illegible] [illegible] that his debts were [illegible] at law - but [illegible] [illegible] [illegible] would interfere and consider it as a [illegible] in consideration of marriage and good
[illegible] [illegible] too the equity may be rebutted by parol proof as in the two former cases - So it may be shown that that [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible]

Evidence -

There are as yet many cases where this equity may arise and the remedy thus becomes a very important one. This rule prevents wherever there is a Ct of Chy.

Thus very equity which a man has may be seized by fi. fac. as well as rebutted by fac. Thus where A effected with B his agent to purchase land for him. and the deed is made out in B's name. now A may by parol prove in Chy that B was his Agent. & has thus he becomes invested with the equitable right that B has the legal right. But now this very equity of A may be rebutted by fi. fac. testimony by B. as that there was a subsequent agreement by parol that he should hold it. and thus the estate in it may be restored to its legal character only.

But there is a class of cases which appear to depend on a different ground. Suppose A contracts B for land & he pays the price & enters into possession. he dies & the heirs refuse by parol that the land shall be held as before. it may be seen

But the Ct will not suffer parol to [illegible] the [illegible]

Evidence.-

There one more interesting thing relative to proof. There is such a thing as established by parol proof that the holder of a deed is only a trustee for another. And you may by a set of facts prove that the man holds the deed as a Mortgage. Notwithstanding the rule that parol proof shall not be admitted to vary the terms of the Contract - from these set of facts you infer that the deed is held as a Mortgage.

Thus where Noble owes Stiles not on note and in consideration of that note gives him a deed to Stiles here Noble may prove that Stiles holds the note and that he has received the interest on the note - that he has since rented the premises of Stiles for much. Stiles holds him - Now these are facts in pais and when proved by parol evidence by the Ct will say Stiles you are a mere trustee and must give up the premises -

But by the Statute of frauds and perj - this must be in writing and here is a difficulty I must explain but the Supreme Court is clear from other evidence that the deed was to be in trust - to prevent execution &c on the ground they were a party & through that it was by fraud or in other cases conclusive and the deed was from the beginning a mortgage

Evidence

The law with respect to comparison of hand writing is very confused. I am not perfectly satisfied myself on the subject. There is one point which I wish mention and that is that old doctrine respecting the difference between civil and criminal cases is entirely exploded.

In cases of treason the law does not require proof where papers has accompanied for 30 years.

There is an old rule that if any person [illegible] been made executed which creates another upon from the execution of the recited deed — and that rule is established — But I know not that to [illegible]